(17)

No. 92-1292-CFX
Status: GRANTED

Title: Luther R. Campbell aka Luke Skyywalker, et al., Petitioners
v.
Acuff-Rose Music, Inc.

Docketed:
January 25, 1993

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Turk,Alan Mark

Counsel for respondent: Norwood,E. Andrew, Rosdeitcher,Sidney S.

Lodging filed 1-25-93 consisting of 2 audio tapes and 12 sets of 4 document exhibits. Ptn due 1-24-93, Sunday, received 1-25-93.

Entry	Date	Note	Proceedings and Orders
1	Jan 25 1993	G	Petition for writ of certiorari filed.
2	Feb 24 1993	G	Motion of Capitol Steps Productions Inc., et al. for leave to file a brief as amici curiae filed.
3	Feb 24 1993		LODGING consisting of 10 copies of a tape submitted by amici Capitol Steps Productions, et al.
4	Feb 25 1993		Brief of respondent Acuff-Rose Music, Inc. in opposition filed.
5	Mar 3 1993		DISTRIBUTED. March 19, 1993
7	Mar 22 1993		REDISTRIBUTED. March 26, 1993
8	Mar 29 1993		Motion of Capitol Steps Productions Inc., et al. for leave to file a brief as amici curiae GRANTED.
9	Mar 29 1993		Petition GRANTED. limited to the following question: "Whether petitioners' commercial parody was a 'fair use' within the meaning of 17 U. S. C. Section 107."
			**********
11	Apr 12 1993		Order extending time to file brief of petitioner on the merits until May 28, 1993.
12	May 18 1993		Brief amici curiae of Concerned Law Professors Robert C. Berry, et al. filed.
13	May 27 1993		Brief amici curiae of Home Box Office, et al. filed.
		*	LODGING consisting of one video tape submitted by Home Box Office, et al.
14	May 28 1993		Joint appendix filed.
		*	LODGING to joint appendix consisting of two audio tapes identified as Exhibit D and Exhibit E, and nine copies of a 12 page document of printed exhibits.
15	May 28 1993		Brief of petitioners Luther R. Campbell, et al. filed.
16	May 28 1993		Brief amicus curiae of The Harvard Lampoon filed.
17	May 28 1993		Brief amicus curiae of Warner Bros.,a Division of Time Warner Entertainment Co. filed.
18	May 28 1993		Brief amicus curiae of American Civil Liberties Union filed.
19	May 28 1993		Brief amicus curiae of Pen American Center filed.
20	May 28 1993		Brief amici curiae of Capitol Steps Productions, Inc., et al. filed.
21	May 28 1993		LODGING consisting of audio tapes,(12 copies of "Yankee Doodle" and 12 copies of "Joy of Sax") received from

2 (1st)

No. 92-1292-CFX

Entry	Date	Note	Proceedings and Orders
			amicus Capitol Steps Production.
22	Jun 28 1993		Brief of respondent Acuff-Rose Music Inc. filed.
23	Jun 28 1993		Brief amici curiae of National Music Publishers' Association, et al. filed.
24	Jun 28 1993		Brief amici curiae of Composers and Songwriters Fred Ebb, et al. filed.
25	Jul 23 1993	G	Application (A93-81) extension of time to file reply brief on the merits, submitted to Justice Stevens.
26	Jul 26 1993		Application (A93-81) granted by Justice Stevens extending the time to file until August 4, 1993.
27	Aug 4 1993		Reply brief of petitioner filed.
28	Sep 2 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Sixth Circuit.
29	Sep 8 1993		Record filed.
		*	Original proceedings United States District Court for the Middle District of Tennessee. (BOX)
30	Sep 8 1993		CIRCULATED.
31	Sep 10 1993		SET FOR ARGUMENT TUESDAY, NOVEMBER 9, 1993. (1ST CASE).
32	Nov 9 1993		ARGUED.

(1)

92-1292

No.

Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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131 pp

QUESTIONS PRESENTED

1. Whether this Honorable Court's decision in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) effectively overruled prior decisions of the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit by implying that a commercial parody of an original work is presumptively an unfair use even if the commercial parody is a creative derivative work?

2. Whether the majority opinion of the Court of Appeals for the Sixth Circuit erred in holding that the "commercial use" presumption established by this Honorable Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), is not governed by Rule 301 of the Federal Rules of Evidence?

3. Whether a creative derivative work, such as a musical parody, despite its commercial purpose, can be afforded protection under 17 U.S.C. § 107 because of its importance as a form of social criticism?

4. Whether a copyright holder has a protected interest in the potential market for parodies of his original work, even if the original work does not compete with any existing parody of the original work?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. Whether this Honorable Court's decision in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539 (1985) effectively overruled prior decisions of the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit by implying that a commercial parody of an original work is presumptively an unfair use even if the commercial parody is a creative derivative work.	6
II. Whether the majority opinion of the Court of Appeals for the Sixth Circuit erred in holding that the "commercial use" presumption established by this Honorable Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), is not governed by Rule 301 of the Federal Rules of Evidence.	15
III. Whether creative derivative work, such as a musical parody, despite its commercial purpose, can be afforded protection under 17 U.S.C. § 107 because of its importance as a form of social criticism.	16
IV. Whether a copyright holder has a protected interest in the potential market for parodies of his original work, even if the original work does not compete with any existing parody of the original work.	21
Conclusion	29

Contents

TABLE OF CITATIONS

Cases Cited:

Berlin v. EC Publications, Inc., 329 F.2d 541 (2nd Cir. 1964) 8

Elsmere Music Inc. v. National Broadcasting Co., 623 F.2d 252 (2nd Cir. 1989) 8, 20

Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) 8, 12, 13, 24

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) .....i, 6, 7, 8, 9, 10, 11, 12, 13, 17

Hill v. Whalen, 220 F. 359 (S.D.N.Y. 1914) 26

Contents

	Page
In re Yoder Company, 758 F.2d 1114 (6th Cir. 1985)	16
Pacific & Southern Co. v. Duncan, 74 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 104 (1985)	17
Pillsbury Co. v. Milky Way Productions, Inc., 215 U.S.P.Q. 124 (D.C.N.Ga. 1981)	22
Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966)	27
Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984)	i, 6, 7, 9, 12, 13, 15
University of Notre Dame v. Twentieth Century-Fox, 256 N.Y.S. 2d 301 (1965)	23
Rules Cited:	
Federal Rule of Civil Procedure 56	4, 5
Federal Rule of Civil Procedure 67	4
Federal Rule of Evidence 301	i, 15, 16, 29
Supreme Court Rule 10.1(a)	2
Statutes Cited:	
17 U.S.C. § 107	i, 2, 8, 11, 14, 16
17 U.S.C. § 301	5

Contents

	Page
Other Authorities Cited:	
Even, David, Great Men of American Popular Song, Prentice Hall (1970)	19
Howard, John Tasker, Our American Music: A Comprehensive History From 1620 to the Present, Crowell (1965)	19
H.R. No. 94-1476, 94th Cong., 2d Sess. 66 (1976) (House Report, reprinted in [1976] U.S. Code Cong. & Admin. News	17
Ren. Rep. No. 473, 94th Cong. 1st Sess. 62 (1975) (Senate Report)	17
APPENDIX	
Appendix A — Opinion of the United States Court of Appeals for the Sixth Circuit Filed August 17, 1992	1a
Appendix B — Memorandum Opinion and Order of the United States District Court for the Middle District of Tennessee, Nashville Division	35a
Appendix C — Complaint Filed June 18, 1990 with Exhibits	57a
Appendix D — Affidavit of Oscar Brand Sworn to July 31, 1990 with Exhibits	70a

Contents

Page

Appendix E — Affidavit of Luther Campbell Sworn to July 31, 1990 with Exhibits 79a

No.

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the district court is reported at 754 F. Supp. 1150 (Tenn. M.D. 1991) and is reproduced in Appendix B: App. pp. 35a-56a. The opinion of the United States Court of Appeals for

the Sixth Circuit is reported at 972 F.2d 1429 (6th Cir. 1992), and is reproduced in Appendix A: App. pp. 1a-34a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 17, 1992. Appendix A: App. pp. 1a-34a. The order of the United States Court of Appeals for the Sixth Circuit denying an *en banc* rehearing was entered on October 26, 1992. Jurisdiction of this Court is based on Rule 10.1(a) of the Rules of the Supreme Court.

STATUTE INVOLVED

17 U.S.C. § 107 provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE CASE

Roy Orbison and William Dees were the co-authors of an original musical work entitled "Oh, Pretty Woman." In 1964, Roy Orbison and William Dees assigned their rights in "Oh, Pretty Woman" to the Respondent. On August 26, 1964, the Respondent registered "Oh, Pretty Woman" for copyright protection under the Copyright Registration No. EP-191739.

The Petitioners, collectively known as The 2 Live Crew, are a popular rap music group. On July 5, 1989, the Petitioners, through their general manager, Linda Fine, wrote Gary [*sic.* Gerry] Teifer of Acuff-Rose Music, Inc., informing him that The 2 Live Crew had written a parody of "Oh, Pretty Woman" entitled "Pretty Woman." Ms. Fine advised Acuff-Rose Music, Inc. that the Petitioners intended to afford it, Mr. Dees, and Mr. Orbison all credit evidencing their ownership and authorship of the song, "Oh, Pretty Woman," and that the Petitioners intended to pay the statutory rate for the use of said song. Ms. Fine enclosed a copy of the lyrics and a recording of the parody for his review. Appendix E: Affidavit of Luther Campbell, Exhibit A, App. pp. 83a-84a. On July 17, 1989, Gerry Teifer responded, in writing, to Ms. Fine's correspondence and stated that "I must inform you that we cannot permit the use of parody of 'Oh, Pretty Woman'." Appendix E: Affidavit of Luther Campbell, Exhibit B, App. p. 85a. The Petitioners, over the objection of the Respondent, released on July 15, 1989, the album *As Clean As They Wanna Be,* including the parody "Pretty Woman."

On June 18, 1990, Acuff-Rose filed suit alleging that The 2 Live Crew willfully infringed and commercially exploited its rights in the song "Oh, Pretty Woman" under the United States Copyright Act, interfered with the Respondent's business relations and interfered with the Respondent's prospective business advantage. Appendix C: Complaint, App. pp. 57a-69a.[1] The Petitioners, in response to the Complaint, filed a Motion to Dismiss asserting that, in accordance with Rule 56 of the Federal Rules of Civil Procedure, the Court should dismiss the Respondent's Complaint. R. 3: Motion to Dismiss; R. 5: Memorandum; R. 17: Supplemental Memorandum; Appendix D: Affidavit of Oscar Brand, App. pp. 70a-78a; Appendix E: Affidavit of Luther Campbell, App. pp. 79a-88a; Appendix F: Affidavit of M. William Krasilovsky, App. pp. 89a-94a.

The Petitioners then moved in accordance with Rule 67 of the Federal Rules of Civil Procedure to deposit with the trial court certain funds, as if The 2 Live Crew's version was a derivative work of the Respondent's copyrighted work and calculated the amount deposited based upon the statutory mechanical rate under the Copyright Act. R. 6: Motion to Deposit Funds. The trial court granted the Petitioners' Motion and the funds were interpled. The trial court did not comment on the adequacy of the deposit made. R. 11: Order.

---

1. Attached as Exhibit D to the Complaint was an audio cassette of "Oh, Pretty Woman" as recorded by Roy Orbison. Attached as Exhibit E to the Complaint was an audio cassette of "Pretty Woman" as recorded by the Petitioners. The Petitioners have lodged a copy of each audio cassette with this Honorable Court, so that a comparison of the two songs can be made. Exhibit B of the Complaint, a photocopy of the CD cover and CD, has also been lodged with the Court. Exhibit I, sheet music, to Appendix D, the Affidavit of Oscar Brand, has also been lodged with the Court. Exhibits C and D, the CD cover and CD attached to Appendix E, the Affidavit of Luther Campbell, have also been lodged with the Court.

In response, Acuff-Rose Music, Inc. filed the Declaration of its agent, Gerald Teifer, and the Declaration of a musicologist, Earl Speilman. R. 13: Response; R. 16: Declaration of Gerald Teifer; R. 14: Declaration of Earl Speilman. These declarations did not place any material facts in dispute.

On January 14, 1991, the trial court granted the Petitioners' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The trial court dismissed all three counts of the Respondent's Complaint because "no genuine issue of material fact exists regarding the allegation of copyright infringement." The trial court further held that "The plaintiff's pendent tort claims are preempted by 17 U.S.C. § 301." Appendix B: App. p. 35a. The trial court further held that "This decision does not address whether that sum [the amount interpled by Petitioners] reflects *adequate compliance* with the Act." Appendix B: App. p. 37a. [emphasis added]

The Respondent requested, and the trial court granted, certification for an interlocutory appeal. R. 29: Motion. The Court of Appeals for the Sixth Circuit denied certification and rejected the appeal. R. 32: Order. Thereafter, the Respondent filed two Motions, the first to amend its Complaint and raise new allegations under the Lanham Act and the second to distribute the funds interpled or allow further briefing. R. 35: Motion to Amend; R. 34: Motion to Distribute Funds or Allow Further Briefing. The trial court denied the Motion to Amend and granted the Motion to Allow Further Briefing. R. 43: Order. On October 2, 1991, the trial court entered a final Order, returning the interpled funds to the Petitioners and confirming its summary judgment previously granted. R. 47: Order.

On October 14, 1991, the Respondent filed a notice of appeal. R. 50: Notice of Appeal. On August 17, 1992, the Court of Appeals for the Sixth Circuit, by split decision, reversed and remanded the trial court's order granting the Petitioners' summary judgment.

Appendix A: App. pp. 1a-34a. On August 26, 1992, the Petitioners filed a Petition for Rehearing En Banc in the Court of Appeals for the Sixth Circuit. On October 26, 1992, the Court of Appeals for the Sixth Circuit denied the Petitioners' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THIS HONORABLE COURT'S DECISION IN *SONY CORP. V. UNIVERSAL CITY STUDIOS, INC.*, 464 U.S. 417 (1984) AND IN *HARPER & ROW PUBLISHERS, INC. V. NATION ENTERPRISES*, 471 U.S. 539 (1985) EFFECTIVELY OVERRULED PRIOR DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT BY IMPLYING THAT A COMMERCIAL PARODY OF AN ORIGINAL WORK IS PRESUMPTIVELY AN UNFAIR USE EVEN IF THE COMMERCIAL PARODY IS A CREATIVE DERIVATIVE WORK.

The Court of Appeals for the Sixth Circuit, in its majority opinion in the case at bar, has misapplied this Honorable Court's holdings in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). In both *Sony* and *Harper & Row*, this Honorable Court held that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. at 451 (1984); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. at 562 (1985).[2] The Court of Appeals for the Sixth Circuit both

2. In the Sony case, this Court held that the commercial use presumption had been rebutted by the Respondent. 464 U.S. 417 (1984).

misapplied the commercial use presumption to a created derivative work such as a musical parody, and strengthened the presumption. Justice Brennan in his dissenting opinion in *Harper & Row*, predicted that the commercial use presumption created by this Court in *Sony* would be misapplied and misused to limit the dissemination of creative derivative works. Judge Brennan argued:

> Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. See 17 U.S.C. § 107.

471 U.S. at 579 (1985).

Judge Brennan later noted in his dissenting opinion:

> The Court's reliance on the commercial nature of The Nation's use as "a separate factor that tends to weigh against a finding of fair use," *ante*, at 562, is inappropriate in the present context. Many uses § 107 lists as paradigmatic examples of fair use, including criticism, comment, and news reporting, are generally conducted for profit in this country, a fact of which Congress was obviously aware when it enacted § 107. To negate any argument favoring fair use based on news reporting or criticism because that reporting or criticism was published for profit is to render

meaningless the congressional imprimatur placed on such uses.

471 U.S. at 592 (1985).

The Petitioners respectfully submit that the Court of Appeals for the Second Circuit (the New York market), the Court of Appeals for the Ninth Circuit (the Los Angeles market), and the Court of Appeals for the Sixth Circuit (the Nashville market), because of the geographic concentration of the film, television, and music industries in these cities, play a far more significant role in determining precedent of copyright law than the other federal circuit courts. Therefore, the decision of the Court of Appeals for the Sixth Circuit in the case at bar will have a chilling and stifling effect on the creation and dissemination of commercial musical parodies, and other forms of parody and social criticism.

The majority opinion's restrictive holding in this case is inconsistent with previous rulings by both the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit, and effectively holds that commercial musical parody of a copyrighted work is a misappropriation of the copyrighted work.

Until the issuance of the decision below, the dominant forces in shaping the Fair Use Doctrine as it pertains to musical song parodies had been the Second and Ninth Circuit Courts of Appeal. These Courts, in a series of decisions including *Berlin v. EC Publications, Inc.*, 329 F.2d 541 (2nd Cir. 1964), *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), and *Elsmere Music Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2nd Cir. 1989), have for decades provided an interpretation of 17 U.S.C. § 107 which draws a careful distinction between the parody of a musical work and the mere piracy of that work for commercial gain. These decisions have been the benchmarks which guided composers and performers in this field.

With the decision below, in the third of the major "music circuits," these precedents are now challenged by a competing precedent which would effectively outlaw musical parody in nearly every circumstance. The importance which is likely to be placed on this recent and, in the Petitioners' view, manifestly incorrect precedent, is especially critical for two reasons: First, the Sixth Circuit has not previously spoken at all on the Fair Use Doctrine. The opinion below referred to this action as a "case of first impression" in this Circuit. Appendix A: App. p. 10a. Thus, if the decision below, which effectively outlaws commercial song parodies, remains law, there will be a sharp split among the three Circuits which for all intents and purposes control the music industry. Second, the opinion below relies heavily on this Court's recent decisions in *Harper & Row*, and *Sony*, and implies if it does not directly state that prior Second and Ninth Circuit precedent has been overruled by those recent Supreme Court opinions.

Was it the intention of this Honorable Court by its decisions in the *Sony* and *Harper & Row* cases to reverse prior Second and Ninth Circuit law regarding musical parody? If the answer to this question is in the affirmative, then this Court must also have intended – as will be shown below – to sharply curtail theatrical and literary criticism by commercial institutions, such as newspapers, and to generally restrict the permissible role of satire and criticism in the nation's intellectual life. However, a reading of the *Sony* and *Harper & Row* opinions strongly indicates that none of this was in the Court's mind when it issued those decisions, and that the ruling below is therefore simply misguided.

In *Sony Corp. v. Universal City Studios*, 464 U.S. 416, 104 S. Ct. 774 (1984), the owners of certain copyrights of television programs brought a copyright infringement action against certain manufacturers of home videotape recorders. The District Court for the Central District of California, 480 F. Supp. 429 (D.C. Cal. 1982), denied all relief sought by the copyright owners and entered

judgment for the manufacturers, and the copyright owners appealed. The Court of Appeals for the Ninth Circuit, 659 F.2d 963 (9th Cir. 1983), reversed the district court's judgment on copyright claim, and the manufacturers petitioned for writ of certiorari. The Supreme Court opinion by Justice Stevens said that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owners of the copyright." 460 U.S. at 451. But the court went on to hold that the respondent manufacturers of home videotape recorders had demonstrated a significant likelihood that substantial numbers of copyright holders who licensed their work for broadcast on free television would not object to having their broadcasts time shifted by private viewers and that such time shifting had not been shown to cause any likelihood of harm to the potential market for, or the value of, their copyrighted works. The court therefore held that the "commercial use" presumption had been rebutted; that home videotape recorders were capable of substantial non-infringing uses; and thus, that the manufacturers' sale of such equipment to general public did not constitute contributory infringement of respondents' copyrights.

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) former president Gerald Ford had contracted with Harper & Row Publishers, Inc. to publish his as yet unwritten memoirs. Harper & Row thereafter negotiated a licensing agreement with Time Magazine under which Time agreed to pay Harper & Row $25,000 in exchange for the right to excerpt 7,500 words from Mr. Ford's account of his pardon of former President Nixon. The Nation Magazine, a direct competitor of Time, in an effort to scoop Time, published an article which contained 300 to 400 words from President Ford's unpublished manuscript. Time canceled its article and refused to pay Harper & Row the balance of the agreed upon licensing fee. The District Court held that The Nation's publication of the verbatim unpublished work constituted a violation of the Copyright Act and did not constitute fair use. The

Court of Appeals for the Second Circuit reversed and held that The Nation's article did constitute fair use under 17 U.S.C. § 107. This Honorable Court reversed and held that The Nation's article did not constitute fair use.

Nation Enterprises in the *Harper & Row* decision asserted that the article that appeared in The Nation was a reporting of historical events and, therefore, constituted reasonable comment or criticism as permitted by the Fair Use Doctrine. In response, this Court acknowledged the historical importance of social criticism. The Court held that:

> As early as 1841, Justice Story gave judicial recognition to the doctrine in a case that concerned the letters of another former President, George Washington.
>
> "[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purpose of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such as use will be deemed in law a piracy." *Folsom v. Marsh*, 9 F.Cas. 342, 344-345 (No. 4,901) (CC Mass.)
>
> As Justice Story's hypothetical illustrates, the fair use doctrine has always precluded a use that "supersede(s) the use of the original."

Ibid. Accord, S. Rep. No. 94-473, p. 65 (1975) (hereinafter Senate Report).

471 U.S. at 550.

But on the facts of *Harper & Row*, this Court found that "The Nation's use had not merely the incidental effect but the intended purpose of supplanting the copyright holder's commercially valuable right of first publication." 471 U.S. at 562. This Court further acknowledged that:

> Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, see House Report, at 65, the author's right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.

471 U.S. at 564.

In *Harper & Row*, 471 U.S. at 562, the Supreme Court cited the *Sony* case, stating that a commercial purpose merely "tends to weigh against a finding of fair use." The trial court in the case at bar, stated that "The defendant may rebut the presumption of commercial use as described in *Harper & Row* by convincing the court that the parody does not unfairly diminish the economic value of the original. *Fisher*, 794 F.2d at 437". Appendix B: App. p.

41a. By contrast, the majority opinion in the case at bar held:

> We agree that the commercial purpose is not itself controlling on the issue of fair use, but find that the District Court placed insignificant emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holdings that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." 741 U.S. at 562 (quoting *Sony Corp.*, 464 U.S. at 451).

Appendix A: App. pp. 12a-13a.

The *Sony* case involved verbatim copying of the copyrighted work. The *Harper & Row* case involved the news reporting of an unpublished manuscript by a direct competitor. In neither *Sony* nor *Harper & Row* did this Court examine the application of the Fair Use Doctrine concerning a creative derivative work such as a musical parody. The Court of Appeals has misapplied the commercial use presumption created by this Honorable Court in *Sony* and *Harper & Row* and imposed an unreasonable presumption against a finding of fair use for a commercially exploited creative derivative work. The granting of a writ of certiorari is therefore appropriate to consider the inconsistent precedent established by the Court of Appeals for the Sixth Circuit from that of the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit.

The determination of whether or not the Petitioners' musical parody of "Oh, Pretty Woman" constitutes fair use is a mixed question of law and fact for the Court, not a question of fact for the jury. *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) The first

jurist who considered this mixed question of law and fact was the Honorable Thomas Wiseman, the trial judge. Judge Wiseman correctly found "That no genuine issue of material fact exists regarding the allegations of copyright infringement." Appendix B: App. p. 35a. The trial court correctly applied the four factors codified in 17 U.S.C. § 107 and found:

> . . . that they weigh in favor of the defendants. 2 Live Crew's 'Pretty Woman' is a parody. It's purpose is to poke fun at the original version of "Oh, Pretty Woman." In so doing, the parody copies from the original. Notwithstanding the copying needed to conjure up the original song, for the foregoing reasons the court concludes that 2 live Crew's use of the original copyrighted song is protected fair use.

Appendix B: App. p. 51a.

On appeal, a majority of the Court of Appeals for the Sixth Circuit reversed and remanded and stated in its conclusion that: "It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use." Appendix A: App. p. 18a. The decision of the Court of Appeals for the Sixth Circuit was not unanimous. The Honorable David A. Nelson, Circuit Judge, wrote a strong dissenting opinion which concluded that the Petitioners' derivative work did constitute fair use. Judge Nelson adopted in part the trial court's reasoning and also noted the inconsistency of the majority opinion with precedents established by the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit on the same issue. Appendix A: App. pp. 19a-34a.

The fact is that all song parodies in this country have some commercial purpose. The sweeping majority opinion of the Court

of Appeals in the case at bar would effectively prohibit all forms of parody.

II.

WHETHER THE MAJORITY OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN HOLDING THAT THE "COMMERCIAL USE" PRESUMPTION ESTABLISHED BY THIS HONORABLE COURT IN *SONY CORP. V. UNIVERSAL CITY STUDIOS, INC.*, 464 U.S. 417 (1984), IS NOT GOVERNED BY RULE 301 OF THE FEDERAL RULES OF EVIDENCE.

The majority of the Court of Appeals for the Sixth Circuit, relying upon *Sony Corp. v. Universal City Studios*, 464 U.S. 416, 104 S. Ct. 774 (1984), argued that "Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright. *Sony Corp. v. Universal City Studios*, 464 U.S. at 451" Appendix A: App. p. 13a.

The Court of Appeals for the Sixth Circuit majority opinion imposed a very restrictive presumption on the Petitioners' creative derivative work. The Sixth Circuit held that: "It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use." Appendix A: App. p. 18a. It thus held that this "commercial use" presumption was sufficient to compel a finding that the Petitioners' parody adversely effected the market for and value of the copyrighted work. It reached this conclusion despite the fact that the only evidence of market impact was favorable to the Petitioners. Appendix D: App. pp. 70a-78a and Appendix F: App. pp. 89a-94a. This holding is inconsistent with the Federal Rules of Evidence. Rule 301 of the Federal Rules of Evidence provides:

> In all civil actions and proceedings not

> otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

In *In re Yoder Company*, 758 F.2d 1114, 1119 (6th Cir. 1985), the Court of Appeals for the Sixth Circuit adopted the prevailing view that a rebuttable presumption under Rule 301 of the Federal Rules of Evidence is a "bursting bubble" and that if refuted the rebuttable presumption vanished and had no further probative effect. The majority decision of the Court of Appeals for the Sixth Circuit in the case at bar creates a far more restrictive and inflexible presumption than the "bursting bubble" approach. The Petitioners submit that no commercial parody can overcome the pronounced presumption created by the Court of Appeals for the Sixth Circuit and therefore no commercial parody can qualify as fair use under 17 U.S.C. § 107.

III.

WHETHER A CREATIVE DERIVATIVE WORK, SUCH AS A MUSICAL PARODY, DESPITE ITS COMMERCIAL PURPOSE, CAN BE AFFORDED PROTECTION UNDER 17 U.S.C. § 107 BECAUSE OF ITS IMPORTANCE AS A FORM OF SOCIAL CRITICISM.

The courts initially created Fair Use Doctrine to forcefully promote creative derivative works and social criticism. The judicially created doctrine of fair use was then later codified by Congress in 17 U.S.C. § 107. In codifying the concept of fair use,

Congress made clear that it in no way intended to depart from Court-created principles or to short-circuit further judicial development:

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R. No. 94-1476, 94th Cong., 2d Sess. 66 (1976) (House Report), reprinted in [1976] U.S.Code Cong. & Admin. News, pp. 5659, 5680 (referred to as USCCA). *See also*, Ren. Rep. No.473, 94th Cong. 1st Sess. 62 (1975) (Senate Report).

The trial court acknowledged that "At a minimum, courts have indicated that evaluation of these four factors is required. But they are not exclusive. *Harper & Row*, 471 U.S. at 560; *Pacific & Southern Co. v. Duncan*, 74 F.2d 1490, 1495 n.7 (11th Cir. 1984), *cert. denied*, 471 U.S. 104 (1985)." Appendix B: App. p. 39a. The Petitioners submit that in addition to the four codified factors, the trial court and Judge Nelson considered the creative nature of the Petitioners' derivative work and the importance of social criticism to American society. The majority opinion of the Sixth Circuit ignored these additional factors because of the "blatantly commercial nature" of the Petitioners' derivative work. Appendix A: App., p. 18a.

The Petitioners respectfully assert that the parodist is an important part of American culture. As stated by Judge Nelson in his dissenting opinion, a parody:

> . . . transforms as it copies, and it may well savage the original work in the process. In the past, at least copyright holders have not been overly enthusiastic about agreeing to see their works parodied — and the law itself has licensed parodists, much as the law has given license to book reviewers, drama critics, and other commentators. Ours is a commercial age, to be sure, and consensual "parody licenses" may be more common now than they used to be. I confess that I am still uneasy, however, about the prospect of the courts turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result. "[P]ermissible parody, whether or not in good taste, is the price an artist pays for success. . ." *BMCA, Inc. v. Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting).

Appendix A: App. p. 33a.

The political parody is deeply rooted in our nation's history. These creative derivative works have historically been commercially sold and performed. "Yankee Doodle"[3], "The Star

3. The origins of "Yankee Doodle" have been much debated by historians, but the most persuasive theory traces the song's beginnings to an English ditty, "Lucy Locket" (or "Fisher's Jig"). The "Yankee Doodle" lyrics were originally written (and the title supplied) by an English army surgeon as a comment on the

(Cont'd)

Spangled Banner"[4], and "America" ("My Country 'Tis of Thee")[5] are all political song parodies, with American words put to popular English ballads of the day. The use of political, musical parodies has continued throughout the history of this country, including

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(Cont'd)
raftag character of colonial troops in the French and Indian War. But, during the Revolutionary War, the lyrics were rewritten, in numerous verses and variations, as an anti-British song. Most variant uses, like "The Battle of the Kegs," a "harmonious ditty" by Francis Hopkinson (a signer of the Declaration of Independence) addressed specific current events — in that case a botched plan to blow up English ships in Philadelphia harbor. See Howard, John Tasker *Our American Music: A Comprehensive History From 1620 to the Present*, Crowell (1965), pp. 37, 113-118; See also, Even, David, *Great Men of American Popular Song*, Prentice Hall (1970), p. 6.

4. The "Star Spangled Banner" began, circa 1775, as the marching song of London's Anacreontic Society, "To Anecreon in Heaven." Originally, the song was an ode to love and wine, with each stanza ending "And besides I'll instruct yes, like me, to intwine/ The myrtle of Venus with Bacchus's vine." The first American parody of the song was published in New York in 1793 ("The genius of France from his star begem'd throne"), but the song soon thereafter became a vehicle for patriotic theses, such as "Sons of Columbia," "For the Glorious Fourth of July," "Union of the Gods," and "Freedom." The parody, "Adams and Liberty," helpted boost the Federalist cause, while a few years later "Jefferson and Liberty" boosted the rival party. In the War of 1812, the melody was first used for "The Battle of the Wabash," and — as we know it today — in Francis Scott Key's "Defense of Fort McHenry." Howard, John Tasker *Our American Music: A Comprehensive History From 1620 to the Present, op. cit.*, pp. 121-126.

5. "America" began with "Sally in My Alley," an english tavern song. An early suffragette adopted to it a poem entitled "Rights of Woman." The resulting song began, "God save each female's right / Show to her ravish'd sight / Woman is free." Shortly thereafter, the melody produced the English patriotic standard, "God Save the King." In 1831, Samule Francis Smith used it for "America." *Id.* pp. 126-128.

recent commercial radio station parodies of the 1991 Gulf War[6].

Today, scores of companies, groups, and individuals write, perform, and record political parody songs of copyrighted material. These range from the cast of Saturday Night Live [*see Elsmere Music Co., Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980)], to lesser known local groups which charge for admission, and/or sell audio tapes of their performances.[7] Few, if any, of these groups and individuals seek or obtain permission for their parodies. Further, it is highly unlikely that the copyright owners would grant permission if requested. In the case at bar the Petitioners did seek permission from the Respondent which was refused. Appendix E: Exhibits A & B, App. pp. 83a-85a. The Petitioners respectfully assert that the presumption created by the majority decision of the Court of Appeals for the Sixth Circuit implies that no parody for commercial exploitation could survive and be declared a fair use of the original copyrighted work.

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6. In the first two months after Iraq's invasion of Kuwait, more than a dozen parodies appeared on the airwaves, including "Hussein is Crazy" (to "She Drives Me Crazy"), "Iraqity-Rag" (to "Yackety-Yak"), "Iraq and a Hard Place" (to "A Rock and a Hard Place"), and "Iraqi Blues" (to "Summertime Blues"). All of these songs were written and produced by disk jockeys at commercial radio stations, and given airtime on those stations alongside commercial songs. Baltimore Sun, "Song Parodists Aim Poison-Pen at Iraq," August 23, 1990.

7. These include Minnesota Public Radio's "Prairie Home Companion,," and "American Radio Theatre," Oregon's "Summer Angels," the "Bushwhackers" of Oberlin College, Ohio, the Wisconsin Sierra Club, the "Last Chance Dixieland Jazz Bank" of Helena, Montana, and Washington, D.C.'s "Hexagon," and "Mrs. Foggybottom and Her Friends."

IV.

WHETHER A COPYRIGHT HOLDER HAS A PROTECTED INTEREST IN THE POTENTIAL MARKET FOR PARODIES OF HIS ORIGINAL WORK, EVEN IF THE ORIGINAL WORK DOES NOT COMPETE WITH ANY EXISTING PARODY OF THE ORIGINAL WORK.

The Respondent, as a last resort to convince the trial court and the Court of Appeals for the Sixth Circuit that the Petitioners' parody had an effect on the market of its original work, inconsistently argued that the Petitioners' parody precluded the Respondent from developing its own parody of its own original work. The Respondent had no reasonable expectation of developing a parody which criticized and mocked this time-honored rock-n-roll ballad. Amazingly, the Court of Appeals accepted this argument. Appendix A: App. pp. 16a-17a. If this Court accepts this fabricated argument of the Respondent then no parody, commercial or otherwise, would ever be permitted under the Fair Use Doctrine. According to the Respondent, to defeat a parodist's argument of fair use, a copyright owner would then simply have to make the bold assertion of its intent at some undetermined date in the future to release a parody of its own original work.

The Respondent, as evident by the allegations of its Complaint made it quite clear it had no intent to compete with the Petitioners' parody. The Respondent alleged that: "Requests for licenses that either are not consistent with good taste or would disparage the future value of the copyright are denied." Appendix C: App. p. 59a. The Respondent further stated in the Complaint that "The unauthorized new lyrics created by Defendants for 'Pretty Woman' are disparaging and therefore not consistent with maintaining the value of the copyright in 'Oh, Pretty Woman.'" Appendix C: App. pp. 60a-61a.

The trial court questioned the Respondent's concern and noted in a footnote that:

> It is unclear exactly what Acuff-Rose means when it complains in it response to the Motion for Summary Judgment that the parody "dirt[ies]" the copyright. 2 Live Crew's version is neither obscene nor pornographic. Even if the work included pornographic references, that does not necessarily preclude a finding of fair use. *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D.Ga. 1981).

Appendix B: App. p. 42a, n. 4.

It is evident from the Respondent's allegations as set forth in the Complaint that it would never release a competing parody of its original work similar to that of Petitioners' parody. A parody, by its very nature, is critical and mocks the original work. Quite often, the author of the original work finds the parody offensive.

In *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (D.C.N.Ga. 1981), the District Court held that Screw magazine's use of the Pillsbury Company's trademark, the Popin' Fresh Doughboy, constituted fair use. The court held that:

> Although the portrayal is offensive to the court, the court has no doubt that Milky Way intended to make an editorial comment on the values epitomized by these trade characters. The fact that Screw magazine is offered for sale does not compel a contrary conclusion. Social commentary placed in a newspaper or magazine is not put to a commercial use simply

> because the publication is sold rather than given to the public. The presentation was located on the inside of the magazine, not on the cover where it might be taken more reasonably as an attempt to capitalize on the plaintiff's original work.
>
> The plaintiff suggests that, in addressing this factor, the court should consider the generally salacious content of Screw magazine. The plaintiff seems to believe that a pornographic adaptation of copyrighted works should be accorded less protection under the fair use doctrine than what might otherwise be granted a more continent presentation. The Copyright Act, however, does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection. The character of the unauthorized use is relevant, but, in the court's judgment, the fact that this use is pornographic in nature does not militate against a finding of fair use.

In *University of Notre Dame v. Twentieth Century-Fox*, 256 N.Y.S. 2d 301, 307 (1965), the Supreme Court of New York held:

> "What seems to one to be trash may have for others fleeting or even enduring values" (Hannegan v. Esquire, Inc., 327 U.S. 146, 158, 66 S.Ct. 456, 462, 90 L.Ed. 586). "everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine" (Winters v. People of State of New York, 333 U.S. 507, 510, 68 S.Ct. 665,

667, 92 L.Ed. 840). Accordingly, as intimated at the outset, we may not import the role of literary or dramatic critic into our functioning as judges in this case; and so for purposes of the law we may not reach a conclusion that the works of fiction involved in this litigation are not artistic or literary works. Whether they are creations of merit, whether they have value only as entertainment and no value whatever as opinion, information or education, pose questions which would require us to stake out those elusive lines that we have been warned not to attempt in the cases above cited (see also Molony v. Boy Comics Publishers, 227 App.Div. 116, 171, 98 N.Y.S.2d 119, 123, Van Voorhis, J.). Whether "John Goldfarb, Please Come Home" is a good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases. It is enough that the work is a form of expression "deserving of substantial freedom - both as entertainment and as a form of social and literary criticism" (Berlin v. E.C. Publications, Inc., 2 Cir., 329 F.2d 541, 545, cert. den., 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33); and we are not prepared to hold that exercise of the freedom in the instant circumstances infringes on rights which equity should protect.

In *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986), the Ninth Circuit discussed the fact that very often a parody was critical of the original work. The Court specifically held:

In assessing the economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." B. Kaplan, *An Unhurried View of Copyright* 69 (1967). Copyright law is not designed to stifle critics. "'Destructive' parodies play an important role in social and literacy criticism and thus merit protection even though they may discourage or discredit an original author." *Parody Defense*, 96 Harv.L.Rev. at 1411. Accordingly, the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original – any bad review can have that effect – but rather whether it fulfills the demand for the original. Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable. *See, e.g., Air Pirates*, 581 F.2d at 756; *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964); *Parody Defense, supra*, at 1409-11.

The Petitioners respectfully assert, as supported by the affidavits of their expert witnesses, that the parody and the copyrighted work do not compete. Although the Respondent's version is for commercial gain, the sale of the Petitioners' version will not, in any way, reduce the economic value of the Respondent's work. Mr. Brand states:

> There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.
>
> On the other hand, 2 Live Crew's version, which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called "race" records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original.

Appendix D: App. pp. 75a. This conclusion is also confirmed by Mr. Krasilovsky who states that "In other words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version." Appendix F: App. p. 91a.

In *Hill v. Whalen*, 220 F. 359, 360 (S.D.N.Y. 1914), the Court held that:

> One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much has been reproduced as will materially reduce the demand for the original. If it has, the rights of the owner of the copyright have been injuriously affected. A word of explanation will be here necessary. The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which

> lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), the Court held:

> Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market, *i.e.*, the average citizen rather than the college professor, has no bearing on whether a public benefit may be derived from such a work. Moreover, the district court in emphasizing the commercial aspects of the Hughes biography failed to recognize that "[a]ll publications presumably are operated for profit * * *." *Koussevitzky v. Allen, Towne & Health*, 188 Misc. 479, 483, 68 N.Y.S.2d 779, 783, aff'd, 272 App.Div. 759, 69 N.Y.S.2d 432 (1st Dept. 1947), and that "both commercial and artistic elements are involved in almost every [work] * * *" Note, 56 Colum. L. Rev. supra at 597. Thus, we conclude that whether an author or publisher has a commercial motive or writes in a popular styled is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use. *Cf. Koussevitzky v. Allen, Towne & Health*, 68 N.Y.S.2d supra, 782-784 (construing N.Y. Civil Rights Law, McKinney's Consol. Laws, c. 6, section 51).

The trial court concluded:

> With respect to the parody "Pretty Woman," this fourth factor favors the defendants. As in *Fisher,* it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different. The odds of a record collector seeking the original composition who would also purchase the 2 Live Crew version are remote. Defendants' Affidavit of William Krasilovsky. "The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Defendant's Affidavit of Oscar Brand. Second, while Acuff-Rose is not required to prove damages, *Marcus v. Rowley,* 695 F.2d 1171, 1177 (9th Cir. 1983), it has not produced convincing evidence that any harm to any existing or potential market has occurred. *Cf. Harper & Row,* 471 U.S. at 567 (where trial court found an actual effect on the market). On a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. Acuff-Rose must adduce more than a scintilla of evidence to overcome the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Appendix B: App. pp. 49a-50a.

Judge Nelson, in his dissent, relying on Oscar Brand's affidavit as to the effect of the parody on the market for the original work, stated that "Brand's analysis of the market stands unrefuted." Appendix B: App. p. 32a.

CONCLUSION

The Petitioners respectfully assert that no presumption against a finding of fair use is applicable to a creative derivative work, such as a musical parody. The Petitioners respectfully assert that if a presumption exists precluding fair use of a commercially exploited musical parody, then such presumption is rebuttable as provided by Rule 301 of the Federal Rules of Civil Procedure. The Petitioners respectfully assert that the presumption created by the majority opinion of the Court of Appeals for the Sixth Circuit in the case at bar is far too strong and inflexible and is inconsistent with decisions of both the Court of Appeals for the Second Circuit and the Court of Appeals for the Ninth Circuit. Lastly, the author of an original work cannot fabricate a potential market for parodies of its original work then use that fabricated market to suppress parodies it finds offensive.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 17, 1992

No. 91-6225

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant,

v.

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER; CHRISTOPHER WONGWON, a/k/a FRESH KID ICE; MARK ROSS, a/k/a BROTHER MARQUIS; DAVID HOBBS, a/k/a MR. MIXX; professionally known as 2 LIVE CREW; LUKE SKYYWALKER RECORDS,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Middle District of Tennessee

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Decided and Filed August 17, 1992

Before: NELSON and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

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*Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

JOINER, Senior District Judge, delivered the opinion of the court, in which NORRIS, Circuit Judge, joined. NELSON, Circuit Judge (pp. 19-34), delivered a separate dissenting opinion.

CHARLES W. JOINER, Senior District Judge. In this copyright case, plaintiff appeals summary judgment granted to defendants. The district court held that defendants' use of a song owned by plaintiff was a parody and therefore constituted a fair use of copyrighted material under section 107 of the Copyright Act, 17 U.S.C. § 101 *et seq.*

The 2 Live Crew, a rap music group, released for commercial distribution a version of Acuff-Rose Music's copyrighted song, "Oh, Pretty Woman." Acuff-Rose sued The 2 Live Crew, its individual members and its record company for copyright infringement and alleged pendent state law claims of interference with business relations and interference with prospective business advantage. Defendants filed a motion for dismissal, which was treated as a motion for summary judgment. The district court granted summary judgment, holding that The 2 Live Crew had created a parody and that the parody was a non-infringing "fair use" of the song as defined by section 107 of the 1976 Copyright Act. 17 U.S.C. § 107. We reverse.

I.

"Oh, Pretty Woman" was written and recorded by Roy Orbison and William Dees in 1964. Rights to the song were assigned to Acuff-Rose that same year, and Acuff-Rose registered for copyright protection. The song has become a pop music standard, and Acuff-Rose has realized substantial income from the licensing of "cover" recordings and other derivative works.

Luther Campbell, lead vocalist and song writer of The 2 Live Crew (2 Live Crew), wrote a version of "Oh, Pretty Woman" in May 1989, which he entitled "Pretty

Woman." By affidavit, Campbell stated that he had intended to create a parody as an attempt "through comical lyrics, to satirize the original work . . . ." In June 1989, Campbell's company, Luke Records (then doing business as Skyywalker Records), released "Pretty Woman" as one of ten tracks on a collection entitled "As Clean As They Wanna Be." The credits on the album[1] recognize Orbison and Dees as the writers of "Pretty Woman," and Acuff-Rose as publisher of the song.

On July 5, 1989, following release of the album, Linda Fine, general manager of Luke Records, wrote a letter to Gerald Tiefer of Opryland Music Group (of which Acuff-Rose is a part) to "inform [Tiefer] of 'Two Live Crew's' desire to do a parody" of "Oh, Pretty Woman."[2] Fine stressed that a parody was intended and that the popularity of 2 Live Crew ensured substantial sales:

> At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain [sic] to what Weird Al Yankovic and other satirical artists are doing.
>
> We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

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[1]We use the term "album" generically; "As Clean As They Wanna Be" was also released on compact disc and cassette tape.

[2]The parties dispute the above chronology. Defendants contend that Campbell intended all along to create a comic song and appropriately sought the permission of Acuff-Rose prior to doing so. Acuff-Rose sees Fine's letter as a effort to create a revisionist history of legitimacy for an act of piracy. The district court found that "As Clean As They Wanna Be" was released on July 15, 1989, subsequent to Fine's letter to Tiefer. Campbell's intent is not dispositive of the case, but we note that this finding contradicts Campbell's affidavit. The only support in the record for a July 15 release date is found in Acuff-Rose's response to the motion for dismissal, in which counsel asserted a release date "on or about July 15, 1989." Campbell's affidavit is a better factual source than counsel's contention.

Appendix A

> Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Fine included a cassette tape of 2 Live Crew's version of the song and a lyric sheet for Tiefer to consider.

Tiefer responded tersely: "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" This refusal to grant a license did not dissuade 2 Live Crew from continuing to sell "As Clean As They Wanna Be."

Acuff-Rose brought suit in June 1990 and defendants responded by filing a motion to dismiss, accompanied by affidavits, and sought to deposit $13,867.56. This amount was apparently calculated after reference to statutory royalty rates established by the Copyright Act, and reflected defendants' understanding of what was owed to Acuff-Rose for use of the copyrighted song. The district court ordered the funds deposited with the Clerk of Court.[3] Acuff-Rose responded with affidavits, which the district court relied upon when granting summary judgment.

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[3]At oral argument, counsel for 2 Live Crew stated that the deposit was a tactical mistake which should not be construed as an admission that the group's song was something other than a fair use parody. Our review of the record reveals confusion over the status of "Pretty Woman" as either a "comic" effort, such as those created by comic musician Weird Al Yankovic, or a "parody," which purports to deliver social commentary within a humorous framework. Yankovic's works are licensed uses, not "fair uses" for which a license is not required. This confusion on the part of 2 Live Crew adds weight to Acuff-Rose's assertion that Campbell's intent to create a parody was only formed after "Pretty Woman" was released.

Appendix A

Among the affidavits presented, defendants presented that of Oscar Brand.[4] Brand, who has himself recorded a number of songs which he terms "parodies," stated his opinion that "both the words and the music of the 2 Live Crew performance are classic parodies." Brand dissected the two songs and found substantial similarities of musical structure between them. The 2 Live Crew version has the same 4/4 drum beat as the original and includes a "very recognizable 'bass riff,'" which "is repeated *eight times* . . . ." However, the 2 Live Crew version diverges from the original by following the recognizable riff with "an atypical scraper – a Latin musical device, quite antithetic to the Orbison musical styling." Further, in the 2 Live Crew version, the lead vocalist sings (or raps) "in the key of B major, which, performed against the A major chorus, gives the song a comic aspect."

Lyrically, Brand found "Pretty Woman" to be consistent with a long tradition in the United States of making social commentary through music. African-American rap music, Brand stated, uses parody as a form of protest, and often substitutes new words to "make fun of the 'white-bread' originals and the establishment . . . ." In "Pretty Woman," Brand concluded, "this anti-establishment singing group is trying to show how bland and banal the Orbison song seems to them. It's just one of many examples of their derisive approach to 'white-centered' popular music."

Acuff-Rose presented the affidavit of Ph.D. musicologist Earl V. Speilman. Speilman also examined and compared the two songs and determined that there is "a significant amount of similarity" between them. Speilman identified five specific similarities, including the repetition of the recognizable riff, which "may have actually been sampled or lifted and then incorporated into the recording of 'Pretty Woman' as performed by The 2

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[4]2 Live Crew also presented the affidavit of M. William Krasilovsky, whose conclusions and the reasons therefore are much the same as Brand's.

Live Crew." Speilman concluded that even a listener without musical training would readily discern that "Pretty Woman" was modelled after "Oh, Pretty Woman."

The district court determined that there were no genuine issues of fact material to the question of fair use in dispute, and that the case was therefore suitable for summary judgment. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1153 (M.D. Tenn. 1991). The court then analyzed the factors by which an alleged infringing use is tested for fairness under section 107 of the Act. *Id.* at 1154-59.[5]

Following the district court's determination that "Pretty Woman" was a parody, Acuff-Rose filed motions to distribute the funds deposited by 2 Live Crew with the Clerk of Court, and sought reconsideration of the fair use determination by introducing additional evidence on the question of the impact of the parody upon the market value of the copyrighted original.[6] Based upon its determination of fair use, the district court granted summary judgment and ordered the funds returned to 2 Live Crew.

II.

We review the district court's grant of summary judgment *de novo*. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is appropriate if the non-moving party fails to establish a genuine issue of material fact on an element essential to its case and on which it would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322

[5]The district court also determined that Acuff-Rose's pendent state law claims were preempted by section 301 of the Copyright Act. *Acuff-Rose Music*, 754 F. Supp. at 1159-60. Acuff-Rose does not challenge this determination.

[6]Acuff-Rose also sought leave to amend its complaint to allege violations of the Lanham Act. 15 U.S.C. § 1125(a). The district court denied the motion and Acuff-Rose does not allege error in the denial.

(1986). In making that determination, we view the evidence in the record in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

These general principles apply to the question of fair use, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1257-58 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987), which is a mixed question of law and fact. *Matthews Conveyor Co. v. Palmer Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 560 (1985). In reviewing the district court's determination of fair use, when that court has found facts sufficient to evaluate each of the factors enumerated in section 107 of the Copyright Act, we "'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work.'" *Harper & Row*, 471 U.S. at 560 (quoting *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984)). Our review of the record shows that no material facts are in dispute. The parties dispute the ultimate conclusions to be drawn from the facts. These judgments are legal in nature.

III.

Section 102(a) of the Copyright Act, adopted under the express authority of Section 8 of the United States Constitution granting Congress the power to give authors exclusive rights to their writings, protects "musical works, including any accompanying words." 17 U.S.C. § 102(a)(2). Section 106 of the Act grants to the copyright holder a variety of exclusive rights in the copyrighted work, including the right to "reproduce the copyrighted work in copies or phonorecords," and to "prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(1) and (2). The words and music to plaintiff's song "Oh Pretty Woman" are subject to these protections. However, plaintiff's exclusive rights are also subject to the provisions of sections 107 through

118 of the Act, which create exemptions and limitations on the owner's rights.

Section 107 of the Copyright Act states:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. In this case 2 Live Crew defends against a charge of copyright infringement by arguing that "Pretty Woman" falls within the exceptions spelled out in section 107.

In determining the scope and extent of the exceptions and limitations to copyright protection carved out by section 107, it is important to focus on the plain language of that section and the directions implicit in its form.

Section 107 takes from a copyright owner the exclusive rights to his work insofar as a derivative, or allegedly infringing work, is a "fair use" of the copyrighted work. Traditionally, fair use is defined as "'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'" *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property*, 260 (1944)). Fair use is an "equitable rule of reason," *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984), which is used in order to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir 1980)). Fair use is the only exception to a copyright holder's exclusive rights in his work, but section 107 explains that the overarching concept of fair use embraces use of a copyrighted work for the purpose of "criticism, comment, news reporting, teaching, scholarship, or research."

As the jurisprudence of section 107 has developed, the courts have found that the section's recognition of "comment" and "criticism" as species of fair use also, by practical extension of those terms, includes the use of a copyrighted work (or a portion thereof) as a parody or satire of that work. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992). Indeed, the fair use formulation found in section 107 is a reflection of Congress's intent to codify the common law fair use doctrine,[7] which has long included parody. *Harper & Row*, 471 U.S. at 549; see also *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903) (a parody fair use involving vaudeville impersonations). Therefore, it is understandable that both the parties and the district court focus on parody in their analyses of fair use. However, because the text of section 107 lists specific fair uses, we find that the term parody

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[7] *See* S. Rep. No. 94-473, 94th Cong., 1st Sess. at 61-62 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 65 (1976).

must be either subsumed within the statutory terms "criticism" or "comment," or be an entirely separate category of exception.

Unfortunately, the terminology of the fair use analysis has evolved in such a way that the popular definition of parody and the statutory definition of parody as a form of criticism have become somewhat confused. Popularly, the term parody may be described as "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new artwork that makes ridiculous the style and expression of the original." *Rogers*, 960 F.2d at 309-10. This popular definition has been used on occasion as a synonym for that which is necessary to create an exception to the exclusive rights in a copyrighted work. This use, we find, creates confusion and should be avoided. Much of entertainment involves parodies in the popular sense, but section 107 does not direct the courts to conclude that all such parodies are fair uses. For the purposes of this opinion, we will assume, as found by the district court, that 2 Live Crew's song is a parody of Acuff-Rose's copyrighted song, and proceed to determine whether the calculus of section 107 results in a determination of fair use. That determination requires careful application of the four statutory factors. *Harper & Row*, 471 U.S. at 549; 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-82.1. Although the question of fair use in the context of musical works is one of first impression in this circuit, we do not write on a clean slate.

Purpose and Character of Use

We look first to the purpose and character of the use of Acuff-Rose's song by 2 Live Crew. We accept the district court's conclusion that the purpose of the use was to parody the original.[8] We consider the character of the

[8]We do so with considerable reservation, as the district court's parody analysis does not, in our view, comport with proper analysis of that term.

The district court compared the statement of the parties' affiants and concluded: "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody." *Acuff Rose*, 754 F. Supp. at 1155. The district court closely parsed the lyrics of the two songs, finding that: "Although the parody starts out with the same lyrics as the original, it quickly degenerates into a play on words, substituting predictable lyrics with shocking ones." *Id.* 2 Live Crew contends that by way of the "shocking" lyrics "Pretty Woman" was intended to satirize the original work, as well as society at large. Our difficulty with the district court's conclusion that this intention was realized is that, even accepting that "Pretty Woman" is a comment on the banality of white-centered popular music, we cannot discern any parody of the original song. Failing a direct comment on the original, there can be no parody, as the "copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work." *Rogers*, 960 F.2d at 310 (citing *MCA, Inc.*, 677 F.2d at 185).

In the copyrighted song, the singer remarks on the beauty of a woman he sees on the street. The singer is initially disappointed when the woman rebuffs his advances and later exults when the woman appears to change her mind. Campbell's lyrics involved women but aside from broadly evoking the theme of the original in the opening line of the 2 Live Crew version: "Pretty Woman – Walkin' down the street, Pretty Woman – Girl you look so sweet," bear no discernible relationship to the original. Instead, as Brand noted, the lyrics examine a series of women with unappealing attributes: "Big Hairy Woman – You need to shave that stuff, Big Hairy Woman – You know I bet it's tough, Big Hairy Woman – All that hair it ain't legit, 'Cause you look like 'cousin it,' Big Hairy Woman," or who are not faithful: "Two Timin' Woman – Girl you know you ain't right, Two Timin' Woman – You's out with my boy last night, Two Timin' Woman – That takes a load off my mind, Two Timin' Woman – Now I know the baby ain't mine."

In our opinion, this is not a new work which makes ridiculous the style and expression of the original, although there is plainly an element of the ridiculous to the new work. We cannot see any thematic relationship between the copyrighted song and the alleged parody. The mere fact that both songs have a woman as their central theme is too tenuous a connection to be viewed as critical comment on the original. We find instructive the holding in *Elsmere v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980). The Court of Appeals for the Second Circuit agreed with the district court that the company of the television program "Saturday Night Live" had performed a parody – entitled "I Love Sodom" – of the then-widely known advertising jingle "I Love New York." The new work cast the original image-polishing effort as ridiculous by asserting that the effort to redeem New York City's image was futile. It is this sort of direct comment, comment which is expressly and unambiguously directed at the message of the original work, which constitutes a parody. Similarly, the court in *Rogers* found that a sculpture based upon a copyrighted

use separately. The use of a copyrighted work primarily for commercial purposes has been held by the Supreme Court to be presumptively unfair. *Sony Corp.*, 464 U.S. 417, 449 (1984). "While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain." *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981). The Supreme Court explained that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562.

In the instant case, the district court found, and we agree, that "2 Live Crew's song is included on a commercially distributed album sold for the purpose of making a profit," and that "2 Live Crew's primary goal in releasing 'As Clean As They Wanna Be' is to sell its music . . . ." 754 F. Supp. at 1154. However, the district court saw the Supreme Court's holdings in *Sony Corp.* and *Harper & Row* regarding the presumptively unfair nature of a commercial purpose as "merely 'tend[ing] to weigh against a finding of fair use.'" *Id.* (quoting *Harper & Row*, 471 U.S. at 562). We agree that commercial purpose is not itself controlling on the issue of fair use, but find that the district court placed insufficient emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holding that "'[E]very commercial use of copyrighted material is presumptively an unfair

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photograph was not a parody regardless of the creator's alleged intention to point out the banality of the copyrighted work. *Rogers*, 960 F.2d at 309-10. The new work, the court found, could perhaps be seen as a critique of materialistic society at large, but on its face the sculpture failed to make critical comment regarding the original creative work. *Id.* We are in agreement with the *Rogers* court that the term parody cannot be allowed to assume too broad a definition, for if an "infringement of a copyrightable expression could be justified as a fair use solely on the basis of the infringer's claim to a higher or different artistic use . . . there would be no practicable boundary to the fair use defense." *Id.* at 310.

exploitation of the monopoly privilege that belongs to the owner of the copyright.'" 471 U.S. at 562 (quoting *Sony Corp.*, 464 U.S. at 451). Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair. We are asked to then consider whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the "parody does not unfairly diminish the economic value of the original." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

Although in this case we do not set aside the district court's conclusion that 2 Live Crew's song is a criticism in the nature of a parody in the popular sense, we nevertheless find that the district court erred in the process of determining that the criticism constituted a fair use of the copyrighted work. We find that the admittedly commercial nature of the derivative work -- the *purpose* of the work being no less important than its *character* in the Act's formulation -- requires the conclusion that the first factor weighs against a finding of fair use. *Sony Corp.*, 464 U.S. at 449.

Nature of Copyrighted Work

The district court found that this factor weighed against a determination of fair use, and we agree. *Acuff-Rose*, 754 F. Supp at 1155-56. As a general rule, creative works -- literary works of fiction or artistic works -- are afforded greater protection from the fair use determination than are works of fact. *Harper & Row*, 471 U.S. at 563; *New Era Publications, Int'l v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 297 (1990). The status of "Oh, Pretty Woman" as a creative work is not contested. In determining whether this factor should weigh in favor of the copyright holder we also ask whether the work "represented a substantial investment of time and labor made in anticipation of financial return." *MCA, Inc.*, 677

F.2d at 182. The record amply supports a finding in favor of Acuff-Rose on this factor.

Portion Used

The third factor we consider is the amount and substantiality of the portion of the copyrighted work used in the derivative work in relation to the copyrighted work as a whole. As applied to alleged parodies, this factor has historically turned on analysis of the "conjure up" test. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied sub nom., O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979). The test asks "whether the parodist has appropriated a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire." *Id.* The test describes a continuum of use, and not only scrutinizes the extent of the taking, but the qualitative nature of that taking. *Harper & Row*, 471 U.S. at 565. A *de minimis* use, one that is meager and fragmentary, by definition fails to conjure up the original and does not constitute an infringement. *Elesmere*, 482 F. Supp. at 744. The 2 Live Crew, appropriately, does not attempt to characterize its use of the copyrighted work as *de minimis*. Uses which depart from the *de minimis* level may nevertheless be fair uses, but at some point on the continuum this factor militates against a finding of fair use. *Air Pirates*, 581 F.2d at 757. Parodies are generally allowed to use more of the copyrighted work and still fall within the rubric of fair use than are other types of copying:

> [T]he concept of 'conjuring up' an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to 'conjure up' the original.

Elesmere, 623 F.2d at 253, n.1 (citation omitted).

The district court, having found that 2 Live Crew created a parody in the popular sense, applied the conjure up test. The amount of the original work which is appropriated is a factual issue, but the question whether the taking is excessive under the circumstances is one of law. *Fisher*, 794 F.2d at 438, n.4.

The district court, operating on the assumption that "Pretty Woman" is a parody, concluded: "In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose." *Acuff-Rose*, 754 F. Supp. at 1157. Clearly, the court was using the term parody in its popular sense. While it may not be inappropriate to find that no more was taken than necessary, the copying was qualitatively substantial. Both of defendants' affiants stated that 2 Live Crew's version tracks the music and meter of the original. These opinions were intended to demonstrate that the new song is a parody. However, these opinions point out the substantiality of copying. Near verbatim taking of the music and meter of a copyrighted work without the creation of a parody is excessive taking. *See MCA, Inc.*, 677 F.2d at 183-85. Most importantly, defendants' affiants stated that the song is built upon the recognizable bass or guitar riff of the original by repeating that riff eight times. Acuff-Rose's musicologist stated that the riff was probably sampled from the original, that is, simply recorded verbatim and then mixed with 2 Live Crew's additions. "[T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression." *Harper & Row*, 471 U.S. at 565. The qualitative degree of the copying is even more critical than the quantitative, and we ask what degree of the essence of the original is copied in relation to its whole. *See Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.), *reh'g denied*, 818 F.2d 252, *cert. denied*, 484 U.S. 890 (1987). We

conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original. The facts as developed under this factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" cannot be used in any way to support a finding of fair use.

Effect on Potential Market

This factor has been characterized as "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566; *see also Stewart*, 495 U.S. at 238. This factor requires that a balance be struck "between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair." *Rogers*, 960 F.2d at 311. To demonstrate that the balance weighs in favor of a finding of no fair use:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

Sony Corp., 464 U.S. at 451 (emphasis in original). The focus is on *potential* harm, and the "inquiry must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, 471 U.S. at 568.

In the instant case, the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists. *See Rogers*, 960

F.2d at 312 (the court holding that "there is simply nothing in the record to support a view that [defendant] produced [the derivative art work] for anything other than sale as high-priced art. Hence, the likelihood of future harm to [plaintiff's] photograph is presumed, and plaintiff's market for his work has been prejudiced").

Having determined that 2 Live Crew created a parody, the district court refused to indulge the presumption and concluded that "it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original" because the "intended audience for the two songs is entirely different." *Acuff-Rose*, 754 F. Supp. at 1158. In reaching this conclusion, the district court largely relied on the affidavit of Krasilovsky who stated, in part: "I cannot see how it [the new work] can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." *Id.* Although we have already determined that harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses, we note that inquiry under the fourth statutory factor not only considers harm to the market for the original but harm to the market for derivative works as well. *Id.* This formulation was arrived at by Professor Nimmer, who provided an example relied upon by the *Rogers* court: "[A] movie adaptation is made of a book. Even though the movie may boost book sales, it is an unfair use because of the effect on the potential sale of adaptation rights." *Rogers*, 960 F.2d at 312 (citing 3 Nimmer, § 13.05[B]). Krasilovsky's statement is irrelevant as to the fourth statutory factor. The record on this factor does not support a finding of fair use.

Conclusion

Three of the factors set out in the statute weigh against a finding of fair use. One is, at best, neutral. In dealing with uses popularly termed parodies, the factors involving the commercial nature of the use and the damage to the defendant are of particular significance. It is likely, for example, that an identical use of the copyrighted work in

this case at a private gathering on a not-for-profit basis would be a fair use. It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use.

We conclude that the district court erred in granting summary judgment to defendants. The four factors set forth in section 107 of the Act support the conclusion that 2 Live Crew's use of Acuff-Rose's copyrighted song was not a fair use. We **REVERSE** and **REMAND** for proceedings consistent with this opinion.

DAVID A. NELSON, Circuit Judge, dissenting. A Second Circuit panel that included both of the cousins Hand once called the "fair use" issue "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). It has been said, indeed, that the fair use doctrine "is so flexible as virtually to defy definition." *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 144 (S.D.N.Y. 1968).

Perhaps the most troublesome fair use issue of all is the question of whether a particular parody constitutes fair use of a copyrighted original. The parody cases appear to be in hopeless conflict. Compare, for example, *Loew's, Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958) (Jack Benny's parody of the motion picture "Gaslight" held not to be fair use of the original), with *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (Mad Magazine parodies of Irving Berlin songs held to be fair use).[1] *Cf. Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348 (S.D. Cal. 1955), where the same district judge who rejected the fair use defense for Jack Benny's parody of "Gaslight" accepted the defense for a Sid Caesar parody of "From Here to Eternity." In sum, whether a particular parody is entitled to the protection of the fair use doctrine is a question likely to be dealt with by lower courts in much the same way that the Supreme Court deals with more than a few

[1] As *Berlin* points out, 329 F.2d at 544-45, *Loew's* has been widely criticized. Among the critics is no less a figure than Professor (later Justice) Benjamin Kaplan. See Kaplan, *An Unhurried View of Copyright* (1967) at 69. The Ninth Circuit has said that its *Loew's* decision "was essentially repudiated by Congress's recognition of parody in the notes to the Copyrights Act of 1976." *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986), citing 17 U.S.C.A. § 107 Historical Note. (The Note quotes House Report No. 94-1476 as listing "use in a parody of some of the content of the work parodied" as among "the sort of activities the courts might regard as fair use under the circumstances.")

questions of constitutional law; we think we know fair use when we see it, even if we cannot do a very good job of relating what we see (or do not see) to the governing text.

The text that is pertinent here is statutory, not constitutional.[2] Where parody is concerned, however, the guidance provided by the statute is at least as Delphic as that sometimes provided by the Constitution. The Copyright Act says that "the fair use of a copyrighted work . . . for purposes *such as* criticism, comment . . . scholarship or research, is not an infringement of copyright." 17 U.S.C. § 107 (emphasis supplied). (The statute itself tells us that the words "such as" mean what they say and "are illustrative and not limitative." 17 U.S.C. § 101.) The statute then goes on to list four factors that shall be "include[d]" among the factors considered by a court in determining a question of fair use: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include* [the four factors.]" Section 107 (emphasis supplied). Here again, the list provided by Congress is "nonexclusive," to borrow the term used in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,

[2]There are, to be sure, authorities who would constitutionalize copyright law. Some would treat satire as sacrosanct under the First Amendment. See, *e.g.*, Goetsch, "Parody as Free Speech — The Replacement of the Fair Use Doctrine By First Amendment Protection," 3 W. New Eng. L. Rev. 39 (1980). Others would accord constitutional protection to any parody a limitation on which would, in the opinion of the judge, impede "the Progress of Science" as that phrase is used in the Copyright Clause, Art. I, § 8 of the Constitution. See Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act," ASCAP Copyright Law Symposium No. 34 (1987) at 23. As for me, I cannot work up much enthusiasm for turning every copyright case into a mini-*Marbury v. Madison* or *New York Times Co. v. Sullivan*. The major role in determining how to promote the progress of science has been given, after all, to Congress: "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors. . . ." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The Ninth Circuit has rejected out of hand the notion that the First Amendment gives parodists a blanket protection from copyright infringement actions. *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

471 U.S. 539, 549 (1985); the court is free to consider any other factors that may be relevant.

Where we are dealing with parody, as I shall suggest, unenumerated factors may have no less relevance than the four set forth in the statute — and the statutory factors are likely to have a somewhat different impact on our deliberations than they would in a non-parody situation. Before turning to these matters, however, I think it would be helpful to consider what it is we are talking about when we speak of "parody."

The etymology of the word has direct relevance to this case. The term comes from the Greek *parodeia*, meaning "a song sung alongside another."[3] The musical parody is thus the very archetype of the genre.

One of the best definitions I have come across is the following, which appears in a prize-winning student essay:

> "A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic [or, I would add, for satiric] effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable." *Clemmons*, "Author v. Parodist: Striking a Compromise," ASCAP Copyright Law Symposium No. 33 (1987) at 101.[4]

[3]VII Encyclopedia Britannica (15th ed. 1975) at 768. "*Parodeia*" joins the Greek words for "beside" and "to sing" — the roots of our prefix "para" and our word for a lyric poem, "ode." Webster's New International Dictionary (3d ed. 1961).

[4]See also Note, "The Parody Defense to Copyright Infringement: Productive Fair Use After *Betamax*," 97 Harv. L. Rev. 1395 (1984): "Parody, in its purest form, is the art of creating a new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of an original." The examples cited by the Harvard editors are Cervantes' *Don Quixote* (1614), Pope's *The Rape*

Some authorities go on to suggest that if the derivative work is to be treated as true parody, it must do more than achieve a comic effect: "It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist -- thereby giving the parody social value beyond its entertainment function." *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F.Supp. 351, 357 (N.D. Ga. 1979); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F.Supp. 1517, 1525 (S.D.N.Y. 1988). See also Faaland, "Parody and Fair Use: The Critical Question," 57 Wash. L. Rev. 163 (1981); Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act," ASCAP Copyright Law Symposium No. 34, (1987). But whether or not a derivative work must "criticize" the original, I am not sure that I understand the reservations my colleagues on the panel have expressed in this case about accepting the district court's conclusion that 2 Live Crew's "Pretty Woman" is in fact a parody of the Acuff-Rose original. Under anyone's definition, it seems to me, the 2 Live Crew song is a quintessential parody.

The Second Circuit faced a similar definitional question in *Berlin v. E.C. Publications Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). One of the Irving Berlin pieces on which the Mad Magazine people had worked their peculiar magic was the song "A Pretty

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of the Lock (1712), and Austen's *Northanger Abbey* (1818), all of which parodied then-popular literary genres. Judge Yankwich provides a much longer list of well known parodies in his article "Parody and Burlesque in the Law of Copyright," 33 Can. B. Rev. 1131 (1955). The art form goes back at least as far as Aristophines, the famous comic dramatist of ancient Greece, whose play *The Frogs* (405 B.C.) -- a work still performed today -- spoofed the plays of Aeschylus and Euripides.

Parodies often outlast and outshine the works parodied. A good example is Lewis Carroll's "You Are Old, Father William," a takeoff on Southey's work "The Old Man's Comforts." The texts, which are strikingly similar in form, may be read side-by-side in the appendix to Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act," ASCAP Copyright Law Symposium No. 34 (1987) at 37-38.

Girl is Like a Melody." (Messrs. Orbison and Dees are obviously not the first tunesmiths to have turned their attention to a comely female.) The defendants, in the words of the court,

> "transformed the plaintiffs' 'A Pretty Girl Is Like a Melody,' into 'Louella Schwartz Describes Her Malady'; what was originally a tribute to feminine beauty became a burlesque of a feminine hypochondriac troubled with sleeplessness and a propensity to tell the world of her plight." *Id.* at 543.

This was "parody," the Second Circuit said -- and it was parody that constituted fair use of Irving Berlin's original work:

> "For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' 'Don Quixote' and Swift's 'Gulliver's Travels,' or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest." *Id.* at 545.

In *Fisher v. Dees*, 794 F.2d 434 (9th Cir. 1986), similarly, the Ninth Circuit had occasion to analyze a pair of songs about women named "Sunny" or "Sonny." The first piece, recorded in the 1950s by Johnny Mathis, was entitled "When Sunny Gets Blue." The second, released in 1985 under the title "When Sonny Sniffs Glue," copied the first six bars (the recognizable main theme) of the original song's 38 bars. The derivative work transformed the original opening lyrics -- "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall" -- into "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." *Id.* at 434. After listening to tapes of both songs, the Ninth Circuit panel had no difficulty at all in rejecting an argument that "the so-called parody is not actually a parody, or at least is not

a parody of the composer's song." *Id.* at 436. Said the court,

> "Although we have no illusions of musical expertise, it was clear to us that Dees's version was intended to poke fun at the composers' song, and at Mr. Mathis's rather singular vocal range. We reject the notion that the song was used merely as a vehicle to achieve a comedic objective unrelated to the song, its place and time." *Id.*

Like the Second Circuit panel in *Berlin*, the *Fisher* court affirmed a finding that the parody was entitled to fair use protection as a matter of law. *Id.* at 440.

I myself have no more "illusions of musical expertise" than did the members of the court that decided *Fisher v. Dees*. After listening, however, to Exhibits D and E, the tapes of the two "Pretty Woman" songs, I am satisfied that the 2 Live Crew version both imitates and distorts the original work for comic or satiric effect, and does so in such a way that both the original work and the work of the parodist are readily recognizable. The parody (done in an African-American dialect) was clearly intended to ridicule the white-bread original -- and if a higher criticism is necessary to qualify the derivative work as true parody, such criticism is readily discernible.

The affidavit of Oscar Brand explains, as Judge Joiner has noted, that "this anti-establishment singing group [2 Live Crew] is trying to show how bland and banal the Orbison song seems to them." The district court accepted Brand's explanation. 754 F.Supp. at 1155. So do I. Whether one likes the original or not -- and the maxim "*de gustibus non est disputandum*" comes to mind here -- the original is quite clearly being held up to criticism by 2 Live Crew.

Consider the plot, if one may call it that, of the original work. A lonely man with a strangely nasal voice sees a pretty woman (name unknown) walking down the street.

The man speculates on whether the woman is lonely too. Apostrophizing her in his mind, he urges her to stop and talk and give him a smile and say she will stay with him and be his that night. The woman walks on by, and the man resigns himself to going home alone. Before he leaves, however, he sees the woman walking back to him. End of story.

This little vignette is intended, I think, to be sort of sweet. While it is certainly suggestive, it is also, by the standards of its time, "romantic" rather than indelicate. The singer evokes a sexual theme in his soliloquy, but then leaves the realization of his desire to the listener's imagination.

The parody by 2 Live Crew is much more explicit, and it reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses. The 2 Live Crew singers -- randy misogynists, not lonely Sir Lancelots -- raucously address a "big hairy woman" and her "bald-headed friend," one or both of whom are urged to "let the boys jump in." One singer chides a woman (the big hairy one, I think) for having cheated on him ("Two timin' woman/You's out with my boy last night"). In the end, this cloud proves to have what the singer sees as a silver lining:

> "Two timin' woman/That takes a load off my mind
> Two timin' woman/Now I know the baby ain't mine."

This, I should say, is "criticism" with a vengeance -- and the thematic relationship to the original is obvious. The relationship between the copyrighted song and the parody is every bit as patent here as was the corresponding relationship between the songs considered by the courts in *Elsmere Music, Inc. v. National*

Broadcasting Co., 482 F.Supp. 741 (S.D.N.Y. 1980), *aff'd* 623 F.2d 252 (2d Cir. 1980). That case involved an oft-repeated advertising jingle known as "I Love New York" and a Saturday Night Live take-off entitled "I Love Sodom." The parody was held to constitute a fair use of the original. The statutory factors, in my view, fully support a corresponding result in the instant case.

* * *

The first of the factors that we must consider is this:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. . . ."

In the case before us, of course, the purpose is parody and the character is commercial. Does the mere fact that the parodists hoped to make money mean that their use of the original work is presumptively unfair? I am by no means convinced that the Supreme Court would so hold -- and any such presumption would be readily rebuttable in any event.

It is true that in the *Betamax* case, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), the Court made the broad statement that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright. . . ." It is also true that this statement was quoted with approval in *Harper & Row*, 471 U.S. at 562. But both of those cases involved mechanical copying, literally or figuratively, without alteration of the copied material.

There is a difference, obviously, between copying and caricaturizing. By calling into being a new and transformed work, the caricaturist exercises a type of creativity that is foreign to the work of the copyist. And the creative work of the caricaturist is surely more

valuable than the reproductive work of the copyist. Thus it has been suggested that the presumption of unfairness in cases of commercial exploitation "is sensible and appropriate only when applied to commercial *reproductive* uses. . . ." Note, "The Parody Defense to Copyright Infringement: Productive Fair Use After *Betamax*," 97 Harv. L. Rev. 1395, 1408 (1984).

An illustration may help. W.S. Gilbert and Sir Arthur Sullivan created comic operas that are among the most commercially successful of all time. Gilbert and Sullivan certainly cannot be said to have had "nonprofit educational purposes" in mind when they wrote such a work as *Princess Ida*, one of their minor masterpieces. *Princess Ida* was, in Gilbert's words, "a respectful operatic perversion" of "The Princess," a lengthy poem by Tennyson. Would the world not be a poorer place if Lord Tennyson could have stilled the voice of W.S. Gilbert merely because Gilbert's purposes included the making of money? For anyone who loves Gilbert and Sullivan -- and their number is legion -- the question answers itself.

Similarly, I think, the world would be the poorer if the holders of the copyright on "I Love New York" had been allowed to block the Saturday Night Live rendition of "I Love Sodom." "[I]n today's world of often unrelieved solemnity," as the Second Circuit panel remarked in affirming the judgment in favor of Saturday Night Live, "copyright law should be hospitable to the humor of parody. . . ." *Elsmere Music Co., Inc.*, 623 F.2d at 253.

We should almost certainly be hospitable to the humor of parody if we allowed ourselves to be guided, as the Supreme Court was guided in the *Betamax* case, "by Justice Stewart's exposition of the correct approach to the ambiguities in the law of copyright." *Sony*, 464 U.S. at 431. The cause that is ultimately to be served, Justice Stewart observed in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), is "the cause of promoting broad public availability of literature, music

and other arts." What Justice Stewart called the "ultimate aim" of copyright law is "to stimulate artistic creativity for the general public good." *Id.* (footnote omitted). If we keep this ultimate aim in mind, it seems to me, we are not likely to conclude that parody for profit is presumptively "unfair."

* * *

The second statutory factor to be considered is

"(2) the nature of the copyrighted work. . . ."

The pertinent data in this connection are that Orbison and Dees published "Oh, Pretty Woman" long before the alleged infringement occurred, and that theirs is a work of the imagination rather than a piece of historical reportage.

That the original song had long since been published is a factor which works in favor of the 2 Live Crew defendants. See *Harper & Row*, 471 U.S. at 564, where the Supreme Court declared that "the scope of fair use is narrower with respect to unpublished works." The fact that "Oh, Pretty Woman" is a creative work might tend to offset the publication factor, perhaps, if the work were not being used for the purpose of parody. But parody routinely sets its sights on the fictive as opposed to the factual. If, as the Second Circuit insists, "parody and satire *are* deserving of substantial freedom," *Berlin*, 329 F.2d at 545, it would make no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for parodists' mills for the last two and a half millennia.

* * *

The third statutory factor is a somewhat problematical one, where parody is concerned:

"(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole. . . ."

The "portion used" test is problematical in this context because parody cannot be parody unless it allows the original work to shine through in a form which, while distorted, is recognizable. "Parody by its nature demands close imitation," Bisceglia, "Parody and Copyright Protection," ASCAP Copyright Law Symposium No. 34 at 17; substantial usage is thus almost a given.

The Ninth Circuit has held that the fair use defense must fail when the purported parodists' copying "is virtually complete or almost verbatim." *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). I have no quarrel with this formulation; near-verbatim copying is closer to plagiarism than it is to parody. But neither the music nor the lyrics of 2 Live Crew's "Pretty Woman" can fairly be said to constitute near-verbatim copying of the Orbison and Dees original.[5]

"At the very least," the Second Circuit has said, a parody will pass muster under the "portion used" factor "where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire. . . ." *Berlin*, 329 F.2d at

[5]I recognize that the affidavit of musicologist Earl Spielman refers to a "one measure guitar lick" that "may have actually been sampled or lifted and then incorporated into the recording of 'Pretty Woman' as performed by The 2 Live Crew." But the Copyright Act "protects only those sound recordings 'fixed' on or after February 15, 1972," Note, "Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds," 87 Col. L. Rev. 1723, 1727-28 (1987), citing 17 U.S.C. § 301(c); Orbison and Dees recorded "Oh, Pretty Woman" in 1964. It is arguable, moreover, that a "sampling" of no more than a few notes should be governed by the maxim *de minimis non curat lex*. *Id.* at 1735. Finally, the plaintiffs have not shown by a preponderance of the evidence that any sampling really occurred here — and to my untrained ear, at least, it is obvious that most of the 2 Live Crew music was not lifted electronically from the 1964 recording.

545. Saturday Night Live's "I Love Sodom" was held to pass the "conjure up" test,[6] and 2 Live Crew's "Pretty Woman" does not appear to have appropriated more of the original on which it was based than did "I Love Sodom."

The district court (Wiseman, J.) made these observations about the amount and substantiality of the mimicry in the 2 Live Crew song:

> "In this case, 2 Live Crew has not mimicked so much of 'Oh, Pretty Woman' that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates*, this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin*. In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher*, 794 F.2d at 439." 754 F.Supp. at 1157.

I cannot improve on Judge Wiseman's analysis of the substantiality factor.

* * *

The last of the statutory factors is this:

[6]The Second Circuit noted by way of dictum in that case that "[e]ven more extensive use [than that necessary to 'conjure up' the original] would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." 623 F.2d at 253 n.1. Professor Nimmer's treatise asserts that "[t]his went too far," adding that "[t]he Second Circuit later drew back from this extreme. . . ." 3 Nimmer on Copyright, § 13.03[f] at 13-90.9-.10 (1992), citing *Warner Bros., Inc. v. American Broadcasting Companies*, 654 F.2d 204 (2d Cir. 1981), and *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981). I am by no means sure that the *Elsmere* dictum did go too far, but it makes no difference in the case at bar; the 2 Live Crew song passes the "conjure up" test in any event.

> "(4) the effect of the use upon the potential market for or value of the copyrighted work."

To me, at least, it seems as clear in this case as it did to the Second Circuit in *Berlin* that "the parody has neither the intent nor the effect of fulfilling the demand for the original. . . ." 329 F.2d at 545.

The affidavit of Oscar Brand says that

> "Parodies have never interfered with the popularity of the original. * * * The sales graph of 'Hello, Dolly' didn't change when it became 'Hello, Lyndon,' and 'Hello, Nixon.' Hundreds of popular songs have been 'covered' by parody performances and recordings without altering their popular appeal or interfering with their sales."

Although Brand's assertion that parodies have "never" interfered with the popularity of the original strikes me as dubious, there has been no showing of any such interference here.[7] Brand -- who is probably on firmer ground when he sticks to the specifics of this case -- explains that the audiences for the two songs are quite different:

> "There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.
>
> [ ] On the other hand, 2 Live Crew's version[ ], which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called 'race' records. The group's

[7]Because parody is a special case, moreover, a drop in the popularity of the original "Oh, Pretty Woman" would be of doubtful relevance anyway. "[W]e must accept the harsh truth that parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." Kaplan, *An Unhurried View of Copyright*, at 69.

> popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original."

Brand's analysis of the market stands unrefuted. One month after Brand gave his affidavit, the plaintiff's Director of Licensing, Gerald Tiefer, executed an affidavit in which there is no attempt to deny that the two songs are aimed at different markets.[8] Mr. Tiefer does suggest, however, that the 2 Live Crew parody could impair the value of the plaintiff's right to grant licenses to parodists. And Mr. Jerry Flowers, Executive Director of Publishing for the plaintiff's parent corporation, says in an affidavit that the licensing of parodies of established hit songs has become extremely lucrative.

Judge Joiner invites our attention, in this connection, to *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992), where the Second Circuit observed that "the inquiry considers not only harm to the market for the original [work], but also harm to the market for derivative works." In a passage a portion of which was quoted with approval in *Harper & Row*, 471 U.S. at 568, similarly, the Nimmer treatise says that "[i]f the defendant's work adversely affects the value of any of the rights of the copyrighted work . . . [including the right to license derivative works,] the use is not fair even if the rights thus affected have not as yet been exercised by the plaintiff." 3 Nimmer on Copyrights, § 13.05[B] at 13-88.19 (1992) (citations omitted).

Nimmer, however, is not discussing parody here; the quoted passage deals with a motion picture hypothetically adopted from a copyrighted novel. And neither *Rogers v.*

[8]This case is thus different from *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F.Supp. 1517 (S.D.N.Y. 1988), where testimony "unequivocally established that the songs 'Nightmare on My Street' and 'Are You Ready for Freddy?' are in direct competition." *Id.* at 1528.

Koons nor *Harper & Row* involved parody either. The former was a case in which a sculpture had been copied with great fidelity from a photograph -- the artisans who produced the sculpture were told that the "*work must be just like photo*," 960 F.2d at 305 -- and the latter was a case in which quotations from the unpublished manuscript of President Ford's autobiography were lifted by the defendant verbatim.

Parody, again, is different. It transforms as it copies, and it may well savage the original work in the process. In the past, at least, copyright holders have not been overly enthusiastic about agreeing to see their works parodied -- and the law itself has licensed parodists, much as the law has given license to book reviewers, drama critics, and other commentators. Ours is a commercial age, to be sure, and consensual "parody licenses" may be more common now than they used to be. I confess that I am still uneasy, however, about the prospect of the courts turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result. "[P]ermissible parody, whether or not in good taste, is the price an artist pays for success. . . ." *MCA, Inc. v. Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting).

I said earlier in this opinion that there may be factors which, although not enumerated in the Copyright Act, merit consideration by the courts in determining when parody constitutes fair use. I shall mention only one such factor -- one foreshadowed in what has already been said. It is this: *the social value of the parody as criticism.*

In the case at bar, it seems to me, this factor militates rather strongly in favor of affirmance of the district

court's finding of fair use. The 2 Live Crew "Pretty Woman" is hopelessly vulgar, to be sure,[9] but we ought not let that fact conceal what may be the song's most significant message — for here the vulgarity, to paraphrase Marshall McLuhan, *is* the message. The original work may not seem vulgar, at first blush, but the 2 Live Crew group are telling us, knowingly or unknowingly, that vulgar is precisely what "Oh, Pretty Woman" is. Whether we agree or disagree, this perception is not one we ought to suppress.

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[9]Vulgarity, in practice, probably cuts against acceptance of the parody defense. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981), where the panel majority said this:

> "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).

I have some sympathy for this attitude, particularly where the parties really are "competitors;" be the lyrics of the derivative work dirty or clean, it goes against the grain to let a competitor reap where he has not sown. In the case at bar, however, there has been no showing that the parties are competitors. The 2 Live Crew song, moreover, is not just "a parody or satire on the mores of society" — it is a parody or satire on the mores of Orbison's Pretty Woman and her admirer.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVIS HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW and LUKE SKYYWALKER RECORDS

MEMORANDUM

This case involves a claim by Acuff-Rose Music, Inc. ("Acuff-Rose") for copyright infringement of its song, "Oh, Pretty Woman." Acuff-Rose has named as defendants the members of the rap group 2 Live Crew and Luke Skyywalker Records. The plaintiff contends that the defendants unfairly are trying to cash in on the popularity of "Oh, Pretty Woman."

For the reasons stated below, the Court finds that no genuine issue of material fact exists regarding the allegation of copyright infringement. This claim is dismissed pursuant to Fed. R. Civ. P. 56. The plaintiff's pendent tort claims are preempted by 17 U.S.C. § 301.

Appendix B

I.

This copyright case involves Roy Orbison's musical hit "Oh, Pretty Woman" as recorded by 2 Live Crew. Roy Orbison and William Dees co-authored "Oh, Pretty Woman" in 1964 and assigned their rights in the song to Acuff-Rose Music the same year. "Oh, Pretty Woman" was copyrighted by Acuff-Rose in 1964. Since then the song has continued to generate profits for Acuff-Rose.

On July 5, 1989, 2 Live Crew's manager, Linda Fine, wrote Gary Teifer of Opryland U.S.A., Inc. and Acuff-Rose. Fine informed Teifer that 2 Live Crew was going to parody "Oh, Pretty Woman," that Orbison and Dees would receive full credit as owners and authors, and that 2 Live Crew would pay Acuff-Rose the statutorily required rate for use of the song. Teifer responded on July 17, denying the license request and informing Fine that "we cannot permit the use of a parody of 'Oh, Pretty Woman.' "

On July 15, 1989, 2 Live Crew released its version of "Oh, Pretty Woman" on record albums, tapes and compact discs, entitled "As Clean As They Wanna Be." The release, called "Pretty Woman," is on side B, sandwiched between "Me So Horny" and "My Seven Bizzos." Both the compact disc cover and compact disc itself acknowledge Orbison and Dees as the authors of "Oh, Pretty Woman" and Acuff-Rose as the publisher.

Almost one year later, on June 18, 1990, Acuff-Rose sued 2 Live Crew and their record company, Luke Skyywalker Records, for copyright infringement, interference with business relations, and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman." Acuff-Rose contends that the lyrics of "Oh, Pretty Woman" as sung by 2 Live Crew "are not consistent with good taste or would

Appendix B

disparage the future value of the copyright." Moreover, Acuff-Rose charges that 2 Live Crew's music is substantially similar in melody to "Oh, Pretty Woman" and the lyrics of the first verse are substantially similar to that of the original version. In response, defendants have moved for summary judgment. They argue that "Pretty Woman" is a parody that constitutes fair use under 17 U.S.C. § 107 of the Copyright Act, 17 U.S.C. §§ 101-914 (1982). They also argue that the two tort claims are preempted by 17 U.S.C. § 301. Pursuant to Fed. R. Civ. P. 67, 2 Live Crew has deposited with the Court the $13,867 it maintains is due to Acuff-Rose for use of its song as required by the Copyright Act. This decision does not address whether that sum reflects adequate compliance with the Act.

The resolution of this motion presents two questions for the Court to address: first, whether "Pretty Woman" constitutes fair use of copyrighted material pursuant to 17 U.S.C. § 107; and second, whether the plaintiff's state law claims are preempted by federal copyright law.

II.

A. Standard of review

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. In responding to a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

Appendix B

The Supreme Court concluded in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that a dispute about a material fact is "genuine" within the meaning of Fed. R. Civ. P. 56 only if "the evidence is such that a responsible jury could return a verdict for the nonmoving party." 477 U.S. at 248. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Id.* at 252. Of course, the court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. *Id.* at 255.

B. Fair Use

To foster the widespread dissemination of ideas, the copyright system is "designed to assure contributors to the store of knowledge a fair return for their labors." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985). *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (purpose of copyright is to create incentives for creative effort). Notwithstanding the monopoly granted to the owner, fair use has been defined as the "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent." *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property*, 260 (1944)).

Section 107 of the Copyright Act instructs courts to balance the following four factors:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

> (1) the purpose and character of the use, including whether such use is a commercial nature or is for nonprofit educational purposes;

Appendix B

> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

At a minimum, courts have indicated that evaluation of these four factors is required. But they are not exclusive. *Harper & Row*, 471 U.S. at 560; *Pacific & Southern v. Duncan*, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

Before the court may move to the merits of the statutory fair use analysis, it must consider whether this case is suitable for summary judgment. Plaintiffs allege that a number of material issues of fact remain. "Fair use is a mixed question of law and fact." *Harper & Row*, 471 U.S. at 560 (quoting *Pacific & Southern Co.*, 744 F.2d at 1495 n. 8). "Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court 'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyright work.' " *Id.* Based on the evidence presented by the parties in this case, including copies of the songs, correspondence and affidavits, whether defendant's parody constitutes fair use under 17 U.S.C. § 107 is a question of law for the Court to determine. *See Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (although discovery not commenced, since "parties dispute only the ultimate conclusions to be drawn from the admitted facts . . . we can make them without usurping the function of the jury").

Appendix B

Since no genuine material issues of fact remain, the Court will proceed to address the four factors cited by § 107.[1]

1. *Purpose and Character of the Use.* The first factor the Court must consider is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. As examples of fair use, the preamble of § 107 lists "criticism, comment, news reporting, teaching . . . scholarship, [and] . . . research." 17 U.S.C. § 107. Congress has listed parody as one of those activities that might qualify for the fair use exception. *See* H.R. Rep No. 1476, 94th Cong., 2d Sess., 65 (1976), *reprinted in* 1976 U.S. Code Cong. Admin. News 5680. Obviously, 2 Live Crew's song is included on a commercially distributed record album sold for the purpose of making a profit.

Although 2 Live Crew's primary goal in releasing "As Nasty As They Wanna Be" is to sell its music, that finding "does not necessarily negate a fair use determination. . . ." 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-70 (1990). In *Harper & Row*, the Court stated that a commercial purpose merely "tends to weigh against a finding of fair use." *Harper & Row*, 471 U.S. at 562. "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.*

Importantly for the purposes of this case, it is plain that 2 Live

1. No published Sixth Circuit opinion addresses this type of copyright infringement question. *Compare Pro Arts, Inc. v. Hustler Magazine, Inc.*, 787 F.2d 592 (6th Cir. 1986) (per curiam) (unpublished text in Westlaw). Accordingly, this Court relies on opinions from other circuits, notably the Second and Ninth Circuits.

Appendix B

Crew also desired to parody the original version of "Oh, Pretty Woman."[2] In copyright law, courts have long recognized that satirical expression is "deserving of substantial freedom — both as entertainment and as a form of social and literary criticism." *Berlin v. E.C. Publication, Inc.*, 329 F.2d 541, 545 (2nd Cir.), *cert. denied*, 379 U.S. 822 (1964). Including parody within the fair use doctrine has been recognized as "a means of fostering the creativity protected by the copyright law." *Warner Bros., Inc. v. American Broadcasting Companies*, 720 F.2d 231, 242 (2d Cir. 1983).

Many parodies "distributed commercially may be 'more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work.' " *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (quoting *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981)); *Cf. Original Appalachian Artworks v. Topps Chewing Gum*, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986) (holding that primary purpose behind defendant's parody "is not an effort to make a social comment but is an attempt to make money"). As discussed in Section II.B.4, *infra*, the defendant may rebut the presumption of commercial use as described in *Harper & Row* by convincing the court that the parody does not unfairly diminish the economic value of the original. *Fisher*, 794 F.2d at 437.

Acuff-Rose argues that the song is not a parody. It contends

2 *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366, 376 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979), defines parody as "a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule." *See* Dorson, *Satiric Appropriation and the Law of Libel, Trademark and Copyright: Remedies Without Wrongs*, 65 B.U.L. Rev. 923, 924 (1985) (Parody "is a potent form of social commentary which attempts to expose the foibles and follies of society in direct, biting, critical, and often harsh language — tempered by humor.").

that the 2 Live Crew's version does not comment on the copyrighted work because the former is "primarily about the physical attributes of women" and the latter is "primarily about loneliness."

But based on a comparison of the two songs and the affidavits provided to the Court, it is apparent that 2 Live Crew has created a comic parody of "Oh, Pretty Woman."[3] The theme, content and style of the new version are different than the original. In his affidavit, Luther Campbell, also known as Luke Skyywalker, states that his version of "Oh, Pretty Woman" was written as a parody designed "through comic lyrics, to satirize the original work. . . ." He acknowledges that he purposefully copied selected music and lyrics from "Oh, Pretty Woman" as a device to help listeners identify the parody with the original version. Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody.

2 Live Crew's lyrics provide the strongest evidence of its attempt to parody "Oh, Pretty Woman." Although the parody starts out with the same lyrics as the original, it quickly degenerates into a play on words, substituting predictable lyrics with shocking ones.[4] The first lyrical hint that something is amis comes when a

3 Gerry Teifer's comment in his July 17, 1990 letter to 2 Live Crew that the new version of "Oh, Pretty Woman" is a parody does not necessarily equate with the specific legal definition of parody. Teifer says in his affidavit that he never heard the 2 Live Crew version prior to denying their licensing request.

4 It is unclear exactly what Acuff-Rose means when it complains in its response to the Motion for Summary Judgment that the parody "dirt[ies]" the copyright. 2 Live Crew's version is neither obscene nor pornographic. Even if the work included pornographic references, that does not necessarily preclude a finding of fair use. *Pillsbury Co. v. Milky Way Productions, Inc.* 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

loud, barking laugh immediately follows the first two words of the parody, "pretty woman." (Laughter follows later in the song too.) The purpose of the laughter is soon explained as the ensuing choruses respectively depict a big, hairy woman, a bald-headed woman, and a "two-timin' " woman. Roy Orbison's pretty woman becomes akin to "Cousin It," the ugly, bit character featured on the TV series "The Addams Family." The physical attributes of the subject woman deviate from a pleasing image of feminity to bald-headed, hairy and generally repugnant. To complete the thematic twist, at the end of the parody the "two-timin' " woman turns out to be pregnant. The phrase, "the baby ain't mine" is completely inconsistent with the tone and story of the romantic original. In sum, 2 Live Crew is an anti-establishment rap group and this song derisively demonstrates how bland and banal the Orbison song seems to them. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (noting that "if the copyrighted [work] is not at least in part an object of the parody, there is no need to conjure it up"); Defendant's Affidavits of Oscar Brand and William Krasilovsky.

The parody also employs a number of musical devices that exaggerate the original and help to create a comic effect. 2 Live Crew uses the same drum beat and bass riff to start its song. But unlike the original, only five seconds into the song and immediately following the bass riff, 2 Live Crew inserts a heavily distorted "scraper," indicating a significant disparity in style. The same scraper is used four seconds later to reiterate that message and subsequently at the end of the song as well. Also at the beginning of the parody, the first soloist sings in a different key than the chorus. In addition, four times during the parody, 2 Live Crew repeats Orbison's bass riff over and over again, double the number of times on the original, until the riff begins to sound like annoying scratch on a record.

Although the Court has determined that 2 Live Crew's version parodies the original, a finding of a parody does not necessarily equate with a finding of fair use. *Fisher,* 794 F.2d at 435. "Parody was not classified as a presumptively fair use . . . . Each assertion of the 'parody defense' must be considered individually, in light of the statutory facts, reason, experience, and of course, the general principles developed in past cases." *Id.* As a result, the Court will examine the remaining three statutory elements of § 107.

2. *Nature of the Copyrighted Work.* the second factor is the nature of the copyrighted work. In addressing this element, "the court may consider, among other things, whether the work was creative, imaginative, and original, . . . and whether it represented a substantial investment of time and labor made in anticipation of financial return." *MCA,* 677 F.2d at 182 (citation omitted). *See also Harper & Row,* 471 U.S. at 563; 3 M. Nimmer, *Nimmer on Copyright,* § 13.05[A] at 13-78. Since "Oh, Pretty Woman" is a published work, with creative roots, this factor weighs in favor of the plaintiff.

3. *Amount of Quotation.* The third factor to address is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. This element contains quantitative and qualitative elements and as a result the amount of protected material that a copier may take under the rubric of fair use will vary from case to case.

For instance, fair use may not allow a person to copy the most qualitatively "valuable" portion of the work, even if such portion constitutes a relatively small amount of the entire protected material. *See, e.g., Harper & Row,* 471 U.S. at 565-66. In *Harper & Row* the Supreme Court noted that a taking that is "insubstantial with respect to the infringing work" does not necessarily mean that

fair use applies. *Id.,* 471 U.S. at 565. By contrast, "the copying of an entire work does not preclude fair use *per se.*" *Hustler Magazine, Inc., v. Moral Majority Inc.,* 796 F.2d 1148, 1155 (9th Cir. 1986).

Acuff-Rose argues that the portions taken from "Oh, Pretty Woman" are both qualitatively and quantitatively significant. According to the plaintiff's musicologist, Earl V. Spielman, the two works are substantially similar. The copying includes the name of the song and key lyrics. The 2 Live Crew version also includes the same guitar refrain, opening drum beat and melody and chorus. Affidavit of Earl V. Spielman. Since the original song is so popular, Acuff-Rose contends that 2 Live Crew does not need to copy much of the original in order to conjure up its memory.

But the conclusions drawn by the plaintiffs does not address whether 2 Live Crew used more of the copyrighted work than was necessary to recall or conjure up "Oh, Pretty Woman." *See, e.g., Fisher,* 794 F.2d at 438 n.4 (holding that affidavits conflicting on question of substantiality are irrelevant given that issue of extent of taking is a question of law). No one disputes that 2 Live Crew copied "Oh, Pretty Woman." But the question about substantial similarity cannot be divorced from the purpose for which the defendant's work will be used.

It is a settled aspect of copyright law that paradists have the right to conjure up the object of the parody. In *Berlin,* 329 F.2d 541, the court stated that where "the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper." *Id.* at 545. *See Elsmere Music, Inc. v. National Broadcasting Co.,* 623 F.2d 252,

253 (2d Cir. 1980) ("parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point"). Indeed, the effectiveness of a parody inherently depends on its ability to copy the original work.

Several courts that have balanced the conflict between the rights of the copyright owner against the goals of the parodist have concluded that parodies of songs require more leeway than other types of parodies. The Ninth Circuit reasoned in *Fisher* that resolution of the substantiality question depends on the medium of the respective works. In *Fisher*, the plaintiffs sued for copyright infringement of a song entitled "When Sunny Gets Blue." As in this case, the plaintiffs previously had denied defendant Dees' request to record a parody of the original. Nonetheless, Dees released his parody song "When Sonny Sniffs Glue," copying the musical theme of the original while changing the lyrics. *Id.* at 434. The *Fisher* court observed that:

> Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for accuracy," provides some license for "closer" parody. . . . To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in this original expression."

Fisher, 794 F.2d at 439 (citations omitted). Likewise, in *Berlin*, the Second Circuit affirmed the application of the fair use defense in a case where the defendants, publishers of "Mad Magazine," had

published a volume which parodied twenty-five of the plaintiff's song lyrics in same meter. "The disparaties in theme, content and style between the original lyrics and the alleged infringements could hardly be greater." *Berlin*, 329 F.2d at 545. *Cf. Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (holding that fair use defense cannot apply where the copying is virtually complete or almost verbatim and that parodist may only use what is necessary to conjure up the original), *cert. denied*, 439 U.S. 1132 (1979); *MCA*, 677 F.2d at 185 (holding that where defendant's song "Cunnilingus Champion of Co. C" did not parody plaintiff's song "Boogie Woogie Bugle Boy of Company B," the amount copied by defendants from the original song was so substantial as to be unfairly excessive).

In this case, 2 Live Crew has not mimicked so much of "Oh, Pretty Woman" that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates*, this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin*. In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher*, 794 F.2d at 439.

4. *Effect on the Market.* Finally, as discussed in the first statutory factor under § 107, the Court must examine the effect of the use upon the potential market for or value of the copyrighted work. The Supreme Court has referred to the fourth factor as "the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. *Accord Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980).

The Supreme Court reasoned that this element should be weighed most heavily since "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create." *Sony Corp.*, 464 U.S. at 450. As a result, fair use, "when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Harper & Row*, 471 U.S. at 566-67 (quoting 1 Nimmer, *Nimmer on Copyright*, § 1.10[D] at 1-87). The Court emphasized that to deny a finding of fair use, one need show only that if the defendant's use " 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.' " *Harper & Row*, 471 U.S. at 568 (quoting *Sony Corp.*, 464 U.S. at 451).

Neither *Harper & Row* nor *Sony* involved a parody. But in *Fisher*, which involved a copyright infringement claim and a parody defense, and the Ninth Circuit held that the parody "When Sonny Sniffs Glue" had no cognizable economic impact on the original song. "When Sunny Gets Blue." It concluded that commercial substitution was unlikely, remarking that:

> "When Sunny Get Blue" is a "lyrical song concerning or relating to a woman's feelings about lost love and her chance for .... happiness again." By contrast, the parody is a 29-second recording concerning a woman who sniffs glue, which "ends with noise and laughter mixed into the song." We do not believe that consumers desirous of hearing a romantic and nostalgic ballad such the composers' song would be satisfied to purchase the parody instead.

> Nor are those fond of parody likely to consider "When Sunny Gets Blue" a source of satisfaction. The two works do not fulfill the same demand.

Fisher, 794 F.2d at 438. *See also, Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983) ("Where the copy does not compete in any way with the original . . . concern is absent."), *cert. denied*, 469 U.S. 823 (1984); *Elsmere Music*, 482 F. Supp. 741, 746-47 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (although defendants appropriated the heart of plaintiff's song, since the copying was a parody it could not fulfill demand for the original version). *Cf. New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517, 1528 (S.D.N.Y. 1988) (parody defense rejected where defendant's rap video would be likely to harm the value of carefully planned derivative use of plaintiff's movie in the rap video market).

With respect to the parody "Pretty Woman," this fourth factor favors the defendants. As in *Fisher*, it is extremely unlikely that 2 Liv Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different. The odds of a record collector seeking the original composition who would also purchase the 2 Live Crew version are remote. Defendant's Affidavit of William Krasilovsky. "The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Defendant's Affidavit of Oscar Brand. Second, while Acuff-Rose is not required to prove damages, *Marcus v. Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983), it has not produced convincing evidence that any harm to any existing or potential market has occured. *Cf. Harper & Row*, 471

U.S. at 567 (where trial court found an actual effect on the market). On a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. Acuff-Rose must adduce more than a scintilla of evidence to overcome the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Plaintiffs attempt to focus on their possible future losses and mount two different arguments. First, they contend that 2 Live Crew's parody prevents them from marketing future derivative works, such as a rap version or even their own "burlesque" of the Orbison original. Second, they argue that "Oh, Pretty Woman" "has been tarnished by being associated with these lyrics and with 2 Live Crew" and that will result in the loss of future licensing arrangements.

Since 2 Live Crew's version of "Oh, Pretty Woman" is a parody, that release has not prevented Acuff-Rose from recording whatever version of the original it desires. Likewise, plaintiff's argument that it would be prevented from releasing a parody of their work is meritless. In a world where copyright monopoly stretched to that great extent, parodies would be unlikely ever to be approved by the original author. *See* 3 Nimmer, *Nimmer on Copyright*, § 13.05[C] at 13-90.12; *Fisher*, 794 F.2d at 437 ("Parodists will seldom get permission from those whose works are parodied. . . . The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought.")

Examining the latter argument, several courts have discounted attempts by copyright holders to claim infringement based on the impact of alleged criticism. "In assessing the

economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically'. . . . Biting criticism suppresses demand; copyright infringement usurps it." *Fisher*, 794 F.2d at 437-38 (citations omitted). *Also see Consumers Union*, 724 F.2d at 1050-51; *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

III.

Having applied § 107's four factor, the Court finds that they weigh in favor of he defendants. 2 Live Crew's "Pretty Woman" is a parody. Its purpose is to poke fun at the original version of "Oh, Pretty Woman." In so doing, the parody copies from the original. Notwithstanding the copying needed to conjure up the original song, for the foregoing reasons the Court concludes that 2 Live Crew's use of the original copyrighted song is protected fair use.

IV.

Defendants also argue that plaintiff's state law claims for interference with business relations and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman" are preempted by § 301 of the Copyright Act. 17 U.S.C. § 301 describes the extent to which the Copyright Act preempts state law causes of action based on copyright. It provides in pertinent part:

> (a) On and after January 1, 1978 all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of

copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 ... are governed exclusively by this title. Thereafter no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

A two-part test determines when § 301(a) preempts at common law tort claim. "First, the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in [17 U.S.C. § 102]. Second, the right must be equivalent to any of the rights specified in [17 U.S.C. § 106]." *Baltimore Orioles v. Major League Baseball Players Assn.*, 805 F.2d 663, 674 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987). *See also Harper & Row Publishers, Inc., v. National Enterprises*, 723 F.2d 195, 199-200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

In this case, Acuff-Rose focuses on the second factor of the § 301 analysis. It argues that the tort claim is not "equivalent to "

the rights set forth in § 106. A right under state law is equivalent if it creates or destroys any of the rights contained in Copyright Act. *Id.* at 676; *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 662-63 (6th Cir.), *aff'g in pertinent part*, 496 F. Supp. 404, 443-44 (S.D. Ohio 1980). Section 106 of the Copyright Act grants plaintiffs the exclusive right to reproduce, distribute, perform and display the copyrighted work, "Oh, Pretty Woman."[5]

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5. Section 106 of the Copyright Act provides:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyright work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyright work publicly.

Appendix B

With respect to Acuff-Rose's claim for interference with business relationships, Tennessee common law provides that "[O]ne's business is entitled to protection 'from tortious interference by a third person who, in interfering therewith, is not acting in the exercise of some right, such as the right to compete for business.' " *Lann v. Third National Bank*, 198 Tenn. 70, 72, 277 S.W.2d 439, 440 (1955). To prevail on such a claim, the plaintiff must show malice, ill will, or wrongful motive. *Id. See also Testerman v. Tragesser*, 789 S.W.2d 553, 556-57 (Tenn. App. 1989) (citing *Lann*). Plaintiff alleges that it has lost benefits flowing from its copyright monopoly. Like the copyright infringement claim, violation of the state law claim rests on a finding of unauthorized copying. "In both cases, it is the act of unauthorized publication which causes the violation. The enjoyment of benefits from derivative use is so intimately bound up with the right itself that is could not possibly be deemed a separate element. . . ." *Harper & Row*, 723 F.2d at 201. In addition, the fact that the state law cause of action requires proof of intent does not necessarily preclude a finding of preemption. The Second Circuit concluded in *Harper & Row* that:

> [T]he fact that cross-appellants pleaded additional elements of awareness and intentional interference, not part of a copyright infringement claim goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental nonequivalence between the state and federal rights implicated.

Id. Since the claim is equivalent to rights established by § 106 the cause of action is preempted by federal law. *See also, Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289, 295 (E.D. Tex. 1988) (holding that plaintiff's claim for tortious interference with

Appendix B

contractual relations is preempted by § 301); *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565, 1572-73 (N.D.Ga. 1988) (same); *McNabb Bennett & Associates, Inc. v. Terp Meyers Architects*, No. 85-C-8792, (N.D. Ill. June 19, 1986) (available on Westlaw) (same).

The question about whether § 301 preempts any Tennessee tort for interference with prospective business advantage is trickier. The plaintiff has not cited any Tennessee case in which recovery was allowed for wrongful interference not involving a breach of contract, and it appears that Tennessee has not developed any significant body of law in this area. *Warde v. Kaiser*, 887 F.2d 97, 103 n.1 (6th Cir. 1989) (citing *Cesnik v. Chrysler Corp.*, 490 F Supp. 859, 874 (M.D. Tenn. 1980) (Wiseman, J.)).

Even assuming arguendo that interference with prospective business advantage constitutes a separate tort under Tennessee law, such a cause of action is nevertheless preempted by federal law. As the Court found for the interference with business relationship claim, this second tort is equivalent to the rights specified in 17 U.S.C. § 106 and thus is preempted by federal law as well. *See e.g, Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1240 (C.D. Cal. 1987) (holding that plaintiff's claim for tortious intereference with prospective business advantage is preempted by § 301).

s/ Thomas A. Wiseman
THOMAS A. WISEMAN, JR.
CHIEF JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVIS HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW and LUKE SKYYWALKER RECORDS

ORDER

For the reasons stated in the accompanying Memorandum, the Motion for Summary Judgment made by defendants 2 Live Crew and Luke Skyywalker Records against plaintiff Acuff-Rose Music, Inc. is granted pursuant to Rule 56 of the Federal Rules of Civil Procedure. 2 Live Crew's rendition of "Prety Woman" is a parody of the original "Oh, Pretty Woman" that constitutes fair use under 17 U.S.C. § 107 of the Copyright Act, 17 U.S.C. §§ 101-914 (1982). *See, e.g., Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

The two Tennessee state law claims for interference with business relations and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman" are preempted by 17 U.S.C. § 301.

IT IS SO ORDERED.

s/ Thomas A. Wiseman
THOMAS A. WISEMAN, JR.
CHIEF JUDGE

APPENDIX C — COMPLAINT FILED JUNE 18, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3 90 0524

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

JURY DEMAND
JUDGE WISEMAN

COMPLAINT

This is an action for copyright infringement and tortious interference with business relationships and prospective business advantage. In support of its complaint, Plaintiff states:

Appendix C

PARTIES

1. Plaintiff Acuff-Rose Music, Inc., is a Tennessee corporation. Plaintiff maintains offices and does business in the Middle District of Tennessee.

2. Defendants Luther Campbell, a/k/a Luke Skyywalker, Christopher Wongwon, a/k/a Fresh Kid Ice, Mark Ross, a/k/a Brother Marquis, and David Hobbs, a/k/a Mr. Mixx, on information and belief are residents of the State of Florida.

3. These individuals make up a "rap" music group known professionally as The 2 Live Crew. The group does business and may be found in the Middle District of Tennessee.

4. Defendant Skyywalker Records is a corporation organized under the laws of the State of Florida, with its principal place of business in Miami, Florida. Skyywalker Records does business and may be found in the Middle District of Tennessee.

JURISDICTION AND VENUE

5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1338, 1331, and 1332 and the doctrine of pendant jurisdiction.

6. Venue lies in this district pursuant to 28 U.S.C. § 1400(a) .

FACTS

7. Roy Orbison and William Dees were the co-authors of an original musical work entitled "Oh, Pretty Woman."

8. The musical work "Oh, Pretty Woman" contains subject

Appendix C

matter copyrightable under the laws of the United States.

9. Roy Orbison and William Dees assigned their rights in "Oh, Pretty Woman" to Acuff-Rose Music, Inc. in 1964.

10. Acuff-Rose's predecessor registered "Oh, Pretty Woman" for copyright protection on August 26, 1964, under Copyright Registration No. EP-191739.

11. The copyright registration in "Oh, Pretty Woman" was acquired by Opryland USA Inc. in 1985.

12. Plaintiff has complied with all of the requirements of the copyright laws of the United States and now holds the copyright to "Oh, Pretty Woman."

13. "Oh, Pretty Woman" was a hit when it was first recorded and has remained a popular work. Plaintiff receives frequent requests to license "Oh, Pretty Woman," and the revenues from domestic and foreign licensing have been and continue to be substantial. Plaintiff has zealously protected the copyright in "Oh, Pretty Woman" and has only granted licenses that were consistent with good taste and that furthered the value of the copyright. License requests are evaluated for their consistency with Plaintiff's long range plans for exploitation of the copyrighted work. Requests for licenses that either are not consistent with good taste or would disparage the future value of the copyright are denied.

14. "Oh, Pretty Woman" has been frequently recorded and widely disseminated both by Plaintiff's predecessors in interest and by Plaintiff's licensees. Defendants had access to "Oh, Pretty Woman."

15. On July 5, 1989, Defendants wrote a letter to Plaintiff, requesting a license to create a derivative work from "Oh, Pretty Woman" for an upcoming album. The work was to be performed, manufactured, and distributed, both live and on commercially available record albums, tapes, and compact discs. On information and belief, various other uses were contemplated, including, but not limited to, distribution of the work as a single and as a music video.

16. On July 17, 1989, Plaintiff informed Defendants by letter that the license would not be granted. Exhibit A.

17. On or about July 15, 1989, Defendants released a record album entitled *As Nasty As They Wanna Be*. The album contained numerous sexually explicit lyrics.

18. Also on or about July 15, 1989, Defendants released a record album entitled *As Clean As They Wanna Be*. This album contains six of the 18 songs on *As Nasty As They Wanna Be*. In addition, *As Clean As They Wanna Be* contains four songs that did not appear on the *As Nasty As They Wanna Be* album.

19. One of the new songs on *As Clean As They Wanna Be* is a derivative work based on Plaintiff's copyrighted work "Oh, Pretty Woman."

20. Both the album cover and the label copy list the title of the song as "Pretty Woman" and state that it was "Written By: Roy Orbison and William Dees" and published by "Acuff-Rose (BMI)." A copy of the label information from the compact disc copy of *As Clean As The Wanna Be* is attached as Exhibit B.

21. The music used on the song "Pretty Woman is substantially similar to "Oh, Pretty Woman" in melody. In

addition, the first verse of "Pretty Woman" is substantially similar to the first verse of "Oh, Pretty Woman". The unauthorized new lyrics created by Defendants for "Pretty Woman" are disparaging and therefore not consistent with maintaining the value of the copyright in "Oh, Pretty Woman." A transcription of the lyrics of "Pretty Woman" from *As Clean As They Wanna Be* is attached as Exhibit C. A copy of "Oh, Pretty Woman," as recorded by Roy Orbison, is attached as Exhibit D. A copy of "Pretty Woman," as it appears on the album *As Clean As They Wanna Be*, is attached as Exhibit E.

22. Plaintiff recently became aware of the Defendants' unauthorized use of "Oh, Pretty Woman."

23. On information and belief, Defendants are continuing to make use of "Oh, Pretty Woman," both in album and related sales and in live performances.

COUNT I

Copyright Infringement

24. Defendants have willfully infringed and commercially exploited Plaintiff's copyright in "Oh, Pretty Woman" by producing, manufacturing, distributing, and performing an unauthorized derivative work — their recording of "Pretty Woman" — that was copied from Plaintiff's copyrighted work, "Oh, Pretty Woman," and that was not licensed by Plaintiff.

COUNT II

Interference with Business Relationships

25. By their unlicensed copying and commercial

exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's business relationships with copyright licensees who have lawfully licensed the right to use "Oh, Pretty Woman."

COUNT III

Interference with Prospective Business Advantage

26. By their unlicensed copying and commercial exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's prospective business advantage in licensing future users of "Oh, Pretty Woman." In addition, Defendants have made disparaging unlicensed uses of "Oh, Pretty Woman." These uses have significantly lessened the value of licensing rights for "Oh, Pretty Woman", are not in good taste, and are detrimental to future attempts by Plaintiff to exploit the work by making it undesirable to future licensees.

RELIEF

WHEREFORE, Plaintiff prays that:

1. A date for a trial of the foregoing action be set.

2. Plaintiff be awarded either its actual damages plus Defendants' profits that resulted from their infringement of Plaintiff's copyright or the statutory damages for willful infringement, whichever is greater.

3. Plaintiff be awarded damages for Defendants' tortious interference with Plaintiff's business relationships and with Plaintiff's prospective business advantage.

4. Defendants forfeit all copies of *As Clean As They Wanna Be*, including all masters, tapes or other means by which *As Clean As They Wanna Be* can be reproduced.

5. Plaintiff be granted temporary and permanent injunctive relief.

6. Plaintiff be awarded its costs and reasonable attorneys' fees.

7. Plaintiff receive such other, further relief, both legal and equitable, as is just.

Respectfully submitted,

Of Counsel:

s/ Hal Willis / by EBM
Hal Willis

ACUFF-ROSE MUSIC, INC.

KING & BALLOW

By: s/ Elizabeth B. Marney
Alan L. Marx
E. Andrew Norwood
Elizabeth B. Marney
F. Casey Del Casino

1200 Noel Place
200 Fourth Ave. North
Nashville, TN 37219
(615) 259-3456

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Appendix C

EXHIBIT A — LETTER OF JULY 17, 1989

OPRYLAND MUSIC GROUP

ACUFF-ROSE MUSIC, INC.

MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,

s/ Gerry Teifer
Gerry Teifer

GT/jmm

Appendix C

EXHIBIT B — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix C

EXHIBIT C — TRANSCRIPTION OF LYRICS AS RECORDED BY 2 LIVE CREW

PRETTY WOMAN
(OH PRETTY WOMAN) AS RECORDED BY 2 LIVE CREW

PRETTY WOMAN WALKIN' DOWN THE STREET
PRETTY WOMAN GIRL YOU LOOK SO SWEET
PRETTY WOMAN YOU BRING ME DOWN TO THAT KNEE
PRETTY WOMAN YOU MAKE ME WANNA BEG PLEASE
OH, PRETTY WOMAN

BIG HAIRY WOMAN YOU NEED TO SHAVE THAT STUFF
BIG HAIRY WOMAN YOU KNOW I BET IT'S TOUGH
BIG HAIRY WOMAN ALL THAT HAIR IT AIN'T LEGIT
'CAUSE YOU LOOK LIKE 'COUSIN IT'
BIG HAIRY WOMAN

BALD HEADED WOMAN GIRL YOUR HAIR WON'T GROW
BALD HEADED WOMAN YOU GOT A TEENY WEENY AFRO
BALD HEADED WOMAN YOU KNOW YOUR HAIR COULD LOOK NICE
BALD HEADED WOMAN FIRST YOU GOT TO ROLL IT WITH RICE
BALD HEADED WOMAN HERE, LET ME GET THIS HUNK OF BIZ FOR YA
YA KNOW WHAT I'M SAYING YOU LOOK BETTER THAN RICE A RONI
OH BALD HEADED WOMAN

Appendix C

BIG HAIRY WOMAN COME ON IN
AND DON'T FORGET YOUR BALD HEADED FRIEND
HEY PRETTY WOMAN LET THE BOYS
JUMP IN

TWO TIMIN' WOMAN GIRL YOU KNOW YOU AIN'T RIGHT
TWO TIMIN' WOMAN YOU'S OUT WITH MY BOY LAST NIGHT
TWO TIMIN' WOMAN THAT TAKES A LOAD OFF MY MIND
TWO TIMIN' WOMAN NOW I KNOW THE BABY AIN'T MINE
OH, TWO TIMIN' WOMAN

OH PRETTY WOMAN

Appendix C

EXHIBIT D — AUDIO TAPE

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix C

EXHIBIT E — AUDIO TAPE

(Omitted Here But Submitted Separately As Lodging Appendix)

APPENDIX D — AFFIDAVIT OF OSCAR BRAND SWORN TO JULY 31, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL, a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT OF OSCAR BRAND

STATE OF NEW YORK)

COUNTY OF NASSAU)

Comes now the Affiant and makes oath as follows:

1. I am Oscar Brand, a citizen and resident of Great Neck, New York. I am over the age of 18 years of age.

2. I am the Curator of the Songwriters Hall of Fame. I am the Editor of "Words About Music" for the National Academy of

Appendix D

Popular Music. I am the Host of "The Folksong Festival," a radio program which has broadcast since 1945 on New York's Public Radio Station WNYC. I am a composer and writer on subjects in the field of popular music.

3. I have been on the faculty of Hosftra University and the New School, lecturing on the subject of folk music, the musical theatre, andAmerican history as revealed in the popular music of the day. I have written books, including *Songs of '76*, (Evans-Lippincott), *The Ballad Mongers*, (Funk and Wagnalls), *The Bawdy Song*, (Grove - Dorchester), *Singing Holidays*, (Knopf), *When I First Came To This Land*, (Dutton), and numerous folios and song collections. As the artist on 85 LPs, videotapes, CD's videotapes, and audiocassetts, I have recorded many parodies of popular songs in such albums as "Tell It To The Marines," "Every Inch A Sailor," "Pie In The Sky," "The Wild Blue Yonder," "Laughing America," "Campaign Songs of the U.S.," etc. As the author of books and folios on the subject of folk and popular music, I have studied the use of parody and satire in American culture. On my radio shows for CBS, NBC, and WNYC, I have often broadcast entire programs on the subject of parodies and satires on popular songs, including a July 29, 1990 airing. As a writer-composer of popular songs, I have often heard many of my own compositions, such as "A Guy Is A Guy," "When I First Came To This Land," "My Old Man's A Sailor," etc. used as parodies and satires.

5. I have been asked to examine the merits of this case, in which a parody of the Roy Orbison - William Dees song, "Oh, Pretty Woman," has been recorded with the title "Pretty Woman" by the group called 2 Live Crew. For the reasons cited abve, I believe I can discuss this subject with complete expertise.

6. In my opinion, both the words and the music of the 2 Live Crew performance are classic parodies.

Appendix D

THE MUSIC

7. The Orbison recording of "Oh, Pretty Woman" begins with a 4/4 drum beat and a very recognizable "bass riff," (Numbers 1, 2, 3, 4). Attached as **Exhibit 1** to my Affidavit is the music chart of "Oh, Pretty Woman" is F Major. The 2 Live Crew version begins with the same drum beat and the recognizable riff. The 2 Life Crew recording is essentially a musical joke, because the riff is followed by an atypical scraper — a Latin musical device, quite antithetic to the Orbison musical styling.

8. As in the Orbison recording, (6, 7, 8, 9, 10), the 2 Live Crew chorus sings the "Pretty Woman" chorus in the key of A major. But, the first soloist on the 2 Live Crew recording proceeds to sing in the key of B major, which, performed against the A major chorus, gives the song a comic aspect. Next, Orbison sings a refrain, (11, 12, 13, 14, 15). This refrain is ignored by 2 Live Crew, who repeat the "Pretty Woman" chorus. Then, in order to remind the listener that Orbison's song is the butt of the joke, the "bass riff" is repeated *eight times* by the 2 Live Crew musicians.

9. The second soloist for 2 Live Crew stays close to Orbison's original melody (19, 20, 21, 22, 23, 24), which makes the altered lyrics seem even more comic. However, once again, the 2 Live Crew soloist ignores the refrain, (25, 26, 27, 28, 29). He also ignores Orbison's following development (from 30 to 58), instead repeating the "Pretty Woman" chorus with comic words.

10. At the end of the 2 Live Crew recording, the bass riff is repeated, subtly changed by the dropping of one measure, another musical joke Finally, the inappropriate scraper is again added to the riff to close the song,

11. *I*n sum, the music on 2 Live Crew's"Pretty Woman" uses

Appendix D

just enough material from the Orbison composition to create a very sophisticated comic parody of the original song.

THE LYRICS

12. The essence of parody is in its play on words. Altering the expected is the key to its humor. The revised form must stay close enough to the original to make comic the sudden twist — the substitution of new words for the familiar.

13. It is for that reason, that the popular song has throughout our history been the vehicle for satire and parody. As I pointed out in my book *Songs of '76*, our first parodies were based on old ballads and folk songs. The American Revolution was fought with re-writes as well as with guns. Nowadays, our popular music parodies are more likely to be comic variations of Beatles songs, Dylanesque laments, and, more recently, Rock and Roll "Strike-offs" of such artists as Chuck Berry and Madonna.

14. On July 29, 1990, I broadcast one of many public radio programs on the subject of parody, using songs performed at the 90th Annual Legislative Correspondents' Association dinner in Albany, New York. Senator Al D'Amato sang a parody of the copyrighted song "It's A Sin To Tell A Lie."

> "Be sure, it's true when you write a headline.
> It's a sin to tell a lie.
> Many a pol has been broken.
> Because The New York Times has spoken."

Another parody featured on the show was a sci-fi version of the copyrighted song "Casey Jones," printed with many others in the *Canadian Folksong Bulletin*, (June - 1989):

"Come all ye spacemen, if you want to hear,
The story of a great planeteer.
Spacey Jones was the pilot's name,
On a fuel-burning rocket, boys, he won his fame."

Merle Travis' "16 Tons" as parodied as "The Schoolteacher's Lament," ending with the words, "I owe my soul to the P.T.A."

15. Parodies have never interfered with the popularity of the original. "The Star Spangled Banner" was altered a thousand times but persisted for over a century as written by Francis Scott Key. The sales graph of "Hello, Dolly" didn't change when it became "Hello, Lyndon," and "Hello, Nixon." Hundreds of popular songs have been "covered" by parody performances and recordings without altering their popular appeal or interfering with their sales. The original song is used because it *is* popular and is so recognizable as to make the alterations more humorous. This is especially true in the case of Afro-American music, of which "rap" is a prime example, being derived from the old "talking blues" form. In talking blues and rap music, parody is often used for protest and satire,. New works are substituted which make fun of the "white-bread originals an the establishment without, in any way, compromising the integrity of the original.

16. In the case of 2 Live Crew's "Pretty Woman" it seems obvious that this anti-establishment singing group is trying to show how bland and banal the Orbison song seems to them. It's just one of many examples of their derisive approach to "white-centered" popular music. They change the lyric "pretty woman" to "bald-headed woman," which is 100% pure parody.

17. Parody often changes the message of the original so that it becomes bawdy and sexist. The Orbison lyric invites the pretty

woman to "Come with me, baby, be mine tonight." The 2 Live Crew version makes the "pretty woman" into a "big hairy woman who ought to shave that stuff." And at the close of 2 Live Crew's version she turns out to be pregnant.

CONCLUSION

18. There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.

19. On the other hand, 2 Live Crew's versions, which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called "race" records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original.

20. To conclude, it is my belief that parodies such as 2 Live Crew's "Pretty Woman" are vital American artifacts. They should be encouraged and protected. The creative edge which has made American music the envy of the world would greatly suffer if such productions as 2 Live Crew's "Pretty Woman" were in any way curtailed.

s/ Oscar Brand
OSCAR BRAND

Sworn to and subscribed before me
this 31 day of July, 1990.

s/ Michael Drosihn
Notary Public

Appendix D

Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEYS FOR DEFENDANTS

Appendix D

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 100 Noel Place, 200 FourthAvenue, North, Nashville, TN 3719, this 1st day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

Appendix D

EXHIBIT 1 — MUSIC CHART OF "OH, PRETTY WOMAN"

(Omitted Here But Submitted Separately As Lodging Appendix)

APPENDIX E — AFFIDAVIT OF LUTHER CAMPBELL SWORN TO JULY 31, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF DADE)

PART I

COMES NOW the Affiant and makes oath as follows:

Appendix E

1. My name is Luther Campbell, and I am a citizen and resident of the State of Florida. I am over the age of eighteen (18) years of age.

2. In May, 1989, I wrote a parody of the song "Oh Pretty Woman" which I entitled "Pretty Woman". In writing the parody I felt it was necessary for the listener to identify the parody version with the original version written and performed by the late Roy Orbison. In writing the lyrics to the parody and selecting the accompanying *score* it was a critical factor that I determine what amount of the original work would be included in the parody. I chose to include the distinctive introduction of the original version of "Oh Pretty Woman" and the first line of lyrics because I felt this was sufficent for the listeners to identify the parody with the original work.

3. The parody "Pretty Woman" was an attempt on my part, through comical lyrics, to satirize the original work "Oh Pretty Woman", written and performed by Mr. Orbison.

PART II

1. On July 5, 1989, Linda Fine, General Manager of Luke Records f/k/a Luke Skyywalker Records, wrote Gerry [Gary] Teifer of Opryland U.S.A., Inc., and Acuff-Rose Music, Inc. Attached as Exhibit A to my Affidavit is a copy of that correspondence. The purpose of Ms. Fine's letter was to advise Acuff-Rose Music, Inc. of the intent of The 2 Live Crew to write and perform a parody of the song "Oh Pretty Woman" originally written and performed by Roy Orbison, for which Acuff-Rose Music, Inc. held the copyright. Ms. Fine enclosed with her correspondence "a copy of the lyrics, so that you may see their satirical parody, very similar in vein to what Wierd Al Yankovic

Appendix E

and other satirical artists are doing". (Exhibit A) Ms. Fine inducated that Acuff-Rose Music, Inc. would be acknowledged as the owner of the song and that the Defendants would pay the statutory rate for its use. Ms. Fine also indicated that the parody would be included on a novelty record and that it would by "heard by hundreds of thousands of new listeners in their homes". (Exhibit A)

2. On July 17, 1989, Gerry Teifer, of the Opryland Music Group, Inc. and Acuff-Rose, Music, Inc., wrote Linda Fine, General Manager of Luke Records, formerly known as Luke Skyywalker Records. Attached as Exhibit B is a copy of that correspondence. Mr. Teifer, as agent for the Plaintiff, indicated that "I must inform you that we cannot permit the use of a parody of "Oh Pretty Woman". (Exhibit B)

4. In June, 1989, Luke Records, formerly known as Skyywalker Records, released "As Clean As They Want to Be" which included "Pretty Woman" the parody of "Oh Pretty Woman" referenced in Ms. Fine's correspondence attached hereto as Exhibit A.

5. The Defendants did acknowledge Acuff-Rose Music, Inc.'s ownership interest in the song and the authorship of Mr. Orbison and Mr. Dees. Attached as Exhibit C is a photocopy of the compact disc cover which acknowledges these rights of the Plaintiff. "As Clean As They Want To Be" had moderate success in the market place, with combined sales of 248,000 units of albums, cassettes and compact discs. The Plaintiff, as the copyright owner of "Oh Pretty Woman" is entitled to be compensated the statutory rate for the combined sales of albums, cassettes and compact discs. An accounting has been performed by Luke Records, formerly known as Luke Skyywalker Records, to determine the amount of money owed to the Plaintiff. This amount is $13,867.56. Attached

Appendix E

as Exhibit D to my affidavit is a photocopy of a check made payable to the Plaintiff in the amount of $13,867.56 to compensate the Plaintiff for the combined sales of "As Clean As They Want To Be" for the inclusion of the parody "Pretty Woman". This check has been tendered to the Plaintiff through the United States District Court for the Middle District of Tennessee as was originally offered in Ms. Fine's correspondence dated July 5, 1989 (Exhibit A).

6. That all correspondence referenced above was sent to my legal counsel, Allen L. Jacobi who advised me that since the song was a parody that it could be released if so desired.

Further the Affiant sayeth not.

s/ Luther Campbell
LUTHER CAMPBELL

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 31 DAY OF JULY, 1990.

s/ Melanie I. Kerr
NOTARY PUBLIC, State of Florida

Appendix E

EXHIBIT A — LETTER OF JULY 5, 1989

July 5, 1989

Gary Teifer
Opryland, USA
P.O. Box 121900
Nashville, TN 37312-1900

RE: "Pretty Woman"

Dear Mr. Teifer:

As the General Manager of Skyywalker Records, I would like to inform you of "Two Live Crew's" desire to do a parody on the above captioned song.

In the event you have not hear of this group, they are one of the most successful rap groups in the country today. This LP will be their third release and the previous two have gone Gold and are close to Platinum.

At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain to what Weird Al Yankovic and other satirical artists are doing.

We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a

novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Sincerely,

Linda Fine
General Manager

Encl.
(cassette/lyric sheet)

EXHIBIT B — LETTER OF JULY 17, 1989

OPRYLAND MUSIC GROUP

ACUFF-ROSE MUSIC, INC.

MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,

s/ Gerry Teifer
Gerry Teifer

GT/jmm

Appendix E

EXHIBIT C — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix E

EXHIBIT D— PHOTOCOPY OF CHECK

(Omitted Here But Submitted Separately As Lodging Appendix)

Appendix E

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizab eth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX F — AFFIDAVIT OF WILLIAM KRASILOVSKY SWORN TO JULY 31, 1990 WITH EXHIBIT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

Acuff-Rose Music Inc.

Plaintiff

vs.

Luther R. Cambell a/k/a Luke Skywalker, Christopher Wongwon a/k/a Fresh Kid Ice, Mark Ross a/k/a Brother Marquis, David Hobbs a/k/a Mr. Mixx

p/k/a The 2 Live Crew

and Luke Skywalker Records

Defendants

AFFIDAVIT

M. William Krasilovsky, an attorney at law, duly admitted to practice in the states of New York and Alaska and in federal courts affirms upon penalty of perjury as follows:

1. I am an attorney specializing in the field of entertainment law with a particular emphasis upon music copyright. I have been in this field since 1953 and attach hereto as Exhibit "A" my resume.

2. As co-author of the text "This Business of Music" published by the leading trade paper of the music industry, *Billboard*, I have stated the following concerning what is considered to be an "answer song" in the industry and its relationship to the doctrine of "fair use:" (pages 142-145)

Appendix F

> "The music industry has for many years contained "answer songs," which have been common in the country and western and rhythym and blues fields — areas that are now part of the pop music business. An original song might have been entitled, for example, "We always Walk in the Rain." If this should achieve success, another writer might shortly thereafter pen a song called, "We Never Walk in the Rain," as a humorous reply to an aftermath of the former song."

In addition, regarding fair use and parody (page 144):

> "Parody and burlesque of a copyrighted work are dependent on fair use and require caution. Mad Magazine was upheld by a Federal Circuit Court of Appeals in its defense of parodies, such as "The Last Time I Saw Paris," on the ground of fair use for humorous critical purposes. The court's decision pointed out that the copying did not exceed the amount required to recall reasonably and evoke in the reader the original version being parodied. . . ."

Page 143 of "This Business of Music" discusses the precedent of "Jesus Christ Superstar." Applying the factors therein designated, I note most emphatically that 2 Live Crew's work in the instant action cannot be considered a substitute for Plaintiff's work and is not in competition with Plaintiff's work.

3. I have been furnished with authentic copies of the two songs in question in the instant action, namely, "Oh Pretty Woman," as

Appendix F

recorded by Roy Orbison, and "Pretty Woman" as recorded by 2 Live Crew and have made the following observations:

a. The recent recording of 2 Live Crew utilizes an accompaniment throughout and in introductory melodic and lyric segment, which is designed to and accomplishes, an evocation of "Pretty Woman" as recorded by Roy Orbison.

b. It proceeds to parody and satirize the original composition in a true "answer song" format by altering the physical attributes of the subject woman; a pleasing image of feminine beauty becomes bald-headed, hairy and generally repugnant. A particular note is the phrase, "the baby ain't mine" which would be completely inconsistent with the tone and story line of the original song,

c. The widespread publicity and news coverage involving 2 Live Crew, as well as my personal observation from hearing the recording, lead me to the conclusion that the intended audience for the two songs is entirely different. In other words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version.

d. In summary, it appears that the effectiveness of the satire required some evocation of the original, but that the line between infringement and fair use was not exceeded.

e. In presenting this affidavit, I should add the note that I do not purport to be a musicologist or music critic, and that the opinions expressed above are not in such claimed capacity.

s/ M William Krasilovsky
M. William Krasilovsky

Appendix F

Sworn to before me
this 31st day of July, 1990

s/ Andrew J. Feinman
Notary Public

Appendix F

EXHIBIT A — RESUME

M. William Krailovsky, Esq.
51 E. 42nd Street, Suite 1601
New York, New York 10017

M. William Krasilovsky is a partner in the firm of Feinman & Krasilovsky, specializing in music and entertainment matters. In addition to the estates of Rachmaninoff, Buddy De Silva, Ray Henderson and Fats Waller the firm also represents or has represented classic industry figures such as Aretha Franklin, Paul Anka, Burt Bacharach, Chuck Berry as well as numerous composers, publishers, recording artists, producers, studios and record companies. Mr. Krasilovsky has represented Warner Brothers publishing companies and the American Guild of Authors and Composers, has served as officer and/or director of a number of music publishing companies such as Weil-Brecht Harms Music Corporation, Peppamar Music, Inc., thus enjoying constant involvement in the negotiation and review of financial matters of such companies and their dealings with ASCAP and BMI.

Additionally, Mr. Krasilovsky is co-author of the books, "THIS BUSINESS OF MUSIC" and "MORE ABOUT THIS BUSINESS OF MUSIC," published by Billboard, the leading trade paper of the music industry. Both books have been recognized as leading reference texts by the American Library Association and ASCAP, as well as being respectfully referred to as the "bible" of the music business by working musicians and others involved in the industry.

Extremely specialized as to copyright law, Mr. Krasilovsky has been published on this subject by Columbia Teacher's College, the Copyright Society and the Performing Arts Review and has lectured at the Practicing Law Institute, Yale University, Columbia

Appendix F

University, University of Miami, New York University, Cornell University, and Brigham Young University.

Within recent years, Mr. Krasilovsky has been engaged as an expert witness in a number of litigations in various courts involving the music industry as a specialist in entertainment law. As such, he was presented by the Record Industry Association of America and was quoted favorably on appeal.

Having graduated Cornell University in 1947 and Cornell Law School in 1949 Mr. Krasilovsky has been adjunct professor at New York University during the past three years, teaching a course in ethics in the entertainment business.

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 26, 1992

No. 91-6225

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant,

v.

LUTHER R. CAMPBELL, A/K/A LUKE SKYYWALKER, ET AL.,
Defendants-Appellees.

ORDER

BEFORE: NELSON and NORRIS, Circuit Judges; and JOINER, Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
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No. 92-1292

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Sixth Circuit properly applied this Court's decisions in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) in deciding this case?

II. Whether the application of Rule 301 of the Federal Rules of Evidence is properly before this Court or is relevant to this case?

III. Whether the commercial purpose of a derivative work weighs against a finding that the use of the underlying copyrighted work is fair?

IV. Whether consideration of the effect on the potential market for or value of a copyrighted work is a proper consideration for determining whether a particular use of a copyrighted work is fair?

RULE 28.1 LISTING

Acuff-Rose Music, Inc. is a Tennessee corporation. It is a wholly owned subsidiary of Opryland Music Group, Inc. Opryland Music Group is a subsidiary of Opryland USA, Inc., which is a subsidiary of Gaylord Broadcasting Co., which is a subsidiary of TGF Company, which is a subsidiary of Gaylord Entertainment Company, a publicly held corporation. Acuff-Rose Music Incorporated's affiliated corporations are Milene Music, Inc. and Springhouse Music, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 28.1 Listing	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statement of the Case	2
A. Background	2
B. Use Of The Copyrighted Work	2
C. Licensing Request	3
D. Material Facts In Dispute	4
E. Discovery	7
F. Interpleader	7
Summary of Argument	8
Reasons for Denying the Writ	10
I. The United States Court of Appeals for the Sixth Circuit properly applied this Court's decisions in *Sony Corp. of America v. Universal City Studios,*	

Contents

Page

Inc., 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) in deciding this case. 10

A. Sixth Circuit's Application of Precedent 10

B. Conflict Between The Circuits 13

II. The application of Rule 301 of the Federal Rules of Evidence is neither properly before this Court nor relevant to this case. 17

III. The commercial purpose of a derivative work weighs against a finding that the use of the underlying copyrighted work is fair. 18

IV. Consideration of the effect on the potential market for or value of a copyrighted work is proper to determine whether a particular use of a copyrighted work is fair. 20

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Berlin v. EC Publications, Inc., 329 F.2d 541 (2d Cir. 1964) 14

Brewer v. Hustler Magazine, Inc., 749 F.2d 527 (9th Cir. 1984) 15

Contents

Page

Elsmere Music Inc. v. National Broadcasting Co., 623 F.2d 252 (2d Cir. 1980) 14, 16

Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) 14, 16, 18, 22

Goldstein v. California, 412 U.S. 546 (1973) 12

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) .....i, 10, 11, 12, 13, 15, 16, 18, 20, 21, 22

Hustler Magazine Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986) 22

New Line Cinema Corp. v. Bertlesman Music Group, Inc., 693 F. Supp. 1517 (S.D.N.Y. 1988) 14

Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) ...14, 15, 16, 20, 23

Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987) ... 16

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) .....i, 10, 11, 12, 13, 15, 16, 21

Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) 14, 16

Warner Bros., Inc. v. American Broadcasting, Inc., 523 F. Supp. 611 (S.D.N.Y. 1981) 15

Warner Bros., Inc. v. American Broadcasting, Inc., 654 F.2d 204 (2d Cir. 1981) 14, 15

Contents

	Page
Youakim v. Miller, 425 U.S. 231 (1976)	17, 18
Statutes Cited:	
17 U.S.C. § 101	12
17 U.S.C. § 106	16
17 U.S.C. § 107 .....13, 14, 16, 18, 19	
Rules Cited:	
Federal Rule of Evidence 301	i, 17
Supreme Court Rule 10.1	8, 17
Supreme Court Rule 10.1(a)	2, 16
Other Authorities Cited:	
Harlon, Manning the Dikes, 13 Record of N.Y.C. Bar Ass'n 541 (1958)	16
Sanders & Gordon, Stranger in Parodies: Weird Al and the Law of Musical Satire, 1 Fordham Ent., Media & Intell. Prop. L.F. 11, 35-36 (1990)	3, 12
12 J. Moore, Moore's Federal Practice ¶ 810.21 (2d ed. 1981)	16

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Respondent Acuff-Rose Music, Inc. ("Acuff-Rose") does not disagree with the statement of jurisdiction contained in the Petition for Writ of Certiorari ("Petition") at 2,[1] except that Acuff-Rose contends that the Petition does not meet the requirements set

1. The Petition for Writ of Certiorari shall be cited as "Petition at __."

forth in Rule 10.1(a) of the Rules of the Supreme Court for this Court to grant certiorari.

STATEMENT OF THE CASE

A. Background

This lawsuit involves the Petitioners' unauthorized use of Acuff-Rose's song "Oh, Pretty Woman." App. 2a-3a. "Oh, Pretty Woman" was written by Roy Orbison and William Dees in 1964 and assigned to Acuff-Rose that year. App. 2a. The copyright was properly registered. *Id.* Acuff-Rose has received substantial income on "Oh, Pretty Woman" from the use of Roy Orbison's recording, from numerous additional recordings, and from licensing of derivative works, such as television commercials and movies. *See* App. 2a: Declaration of Gerald Teifer at ¶ 10. Petitioners, Luther R. Campbell a/k/a Luke Skyywalker, Christopher Wongwon a/k/a Fresh Kid Ice, Mark Ross a/k/a Brother Marquis, David Hobbs a/k/a Mr. Mixx, professionally known as The 2 Live Crew, and Luke Skyywalker Records ("the Petitioners"), copied portions of Respondent's song and incorporated, apparently through sampling, other portions of Respondent's song into their work "Pretty Woman." R. 7: Affidavit of Luther Campbell at pp. 1-2; R. 4: Affidavit of Oscar Brand at pp. 3-4; R. 8: Affidavit of William Krasilovsky at pp. 2; R. 14: Declaration of Earl Speilman at pp. 2-4.

B. Use Of The Copyrighted Work

Contrary to the impression left by the Petition, the chronology of Petitioner's use of the copyrighted work is disputed and is not well developed in the record. App. 3a, n.2. What is clear, however, is that in May 1989, Petitioner Luther Campbell claims to have written "Pretty Woman," a work derived from Acuff-Rose's "Oh, Pretty Woman." App. 2a-3a: R. 7: Affidavit of Luther Campbell Part I ¶ 2. No later than June, 1989, Petitioners released an album

entitled *As Clean As They Wanna Be* containing the derivative work, their version of "Oh, Pretty Woman." *See* R. 7: Affidavit of Luther Campbell, Part II ¶ 4. The trial court incorrectly found that the album was released on July 15, 1989. App. 3a, n.3: R. 25. In Acuff-Rose's Memorandum in Support of Motion to Compel, pending when summary judgment was granted, Acuff-Rose pointed out evidence that sale of *As Clean As They Wanna Be* had actually commenced before either date. App. 3a-4a: R. 21: Memorandum in Support of Motion to Compel, Exhibit A. In fact, the limited records produced to Acuff-Rose by Petitioners showed significant album sales before the end of June, 1989.

C. Licensing Request

The Petition also gives an incomplete picture of the licensing request made by Petitioners. On July 5, 1989, after Petitioners admit sale to the public commenced, Petitioners requested a license to "do a parody."[2] App. 3a: R. 7. Affidavit of Luther Campbell Part II ¶ 1 (stating that permission was sought to write and perform a parody). In their request, Petitioners misled Acuff-Rose about the prior public release by indicating that the use would be made in the future. App. 3a-4a. They did not disclose that the parody[3] was already written and recorded and that the album was

---

2. In the license request, Petitioners stated that they intended to do a parody in the style of Weird Al Yankovic. R. 7: Affidavit of Luther Campbell Exhibit A. Yankovic, recognizing that the extent of his copying in creating a parody does not allow him to qualify for a fair use privilege, secures a license from the copyright owner before creating a parody of the copyrighted work. Sanders & Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 Fordham Ent., Media & Intell. Prop. L. F. 11, 35-36 (1990).

3. Acuff-Rose has used the term parody for the sake of conforming its Opposition more closely to the Petition. This decision is for convenience of the reader only and should not be read as meaning that Acuff-Rose concedes the Petitioners' derivative work was a legal parody. *See* App. 10a, n. 8 (district court's parody analysis does not comport with proper analysis of that term); Acuff-Rose's brief to the Sixth Circuit at 17-20.

already on sale. *See id.* On July 17, 1989, Acuff-Rose denied a license to use its copyrighted work as the basis of a derivative work. App. 4a. Even though Acuff-Rose refused a license, Petitioners continued with the sale of the derivative work. *Id.* The album, both before and after a license was denied, carried a label that stated the derivative work was actually Acuff-Rose's copyrighted work. *See* CD Cover filed with this Court by Petitioners as Exhibit B.

D. Material Facts In Dispute

Petitioners contend that the affidavits submitted by Acuff-Rose in response to the Motion to Dismiss did not place any facts in dispute. Petition at 5. This is not the case. The derivative work and Acuff-Rose's "Oh, Pretty Woman" were extensively compared in affidavits by experts for the parties. App. 5a: R. 4: Affidavit of Oscar Brand; R. 8: Affidavit of William Krasilovsky; R. 14: Declaration of Earl Speilman. In addition, tapes of the two works were submitted to the trial court. R. 1: Complaint, Exhibits D and E. Facts were in dispute.

One of Petitioners' experts, an attorney, expressed the opinion that Petitioners' "Pretty Woman" evokes "Oh, Pretty Woman" but that "the line between infringement and fair use was not exceeded." R. 8: Affidavit of William Krasilovsky at ¶ 3d. Petitioners also tendered the affidavit of an expert who writes parodies. He conceded the extensive copying that Acuff-Rose's expert discussed. However, he concluded that, because the Petitioners created a parody as the affiant frequently did, as a matter of public policy they should be "encouraged and protected." App. 5a: R. 4: Affidavit of Oscar Brand ¶ 20.

Acuff-Rose submitted the affidavit of Earl V. Speilman, a musicologist. Speilman concluded that the two works were substantially similar, that parts of the copyrighted work probably

had been sampled, and that even the musically unsophisticated would immediately conclude that "Pretty Woman" was modeled after "Oh, Pretty Woman." R. 14: Declaration of Earl Speilman ¶¶ 5, 8. Speilman stated that the "significant amount of similarity" between the copyrighted work and the derivative work included:

> a. the one measure guitar lick, which is repeated over and over again in the intro and subsequent transition sections (and which may have actually been sampled or lifted and then incorporated into the recording of "Pretty Woman" [the derivative work] as performed by The 2 Live Crew);
>
> b. the duplication of the opening line of text of "Oh, Pretty Woman" [the copyrighted work] and the use of the words of the title an additional six times in the course of the remainder of "Pretty Woman";
>
> c. the melodic line of the verse sections of the respective songs;
>
> d. the melodic line of the bridge sections of the respective songs;
>
> e. aspects of the formal structures; the opening measure of percussion; the lyrical structures of the respective texts; and the fact that both works are performed in the same key and at approximately the same tempo.

App. 5a: R. 14: Declaration of Earl Speilman ¶ 7. He also stated that "if someone were to just listen to the two works at issue, no matter what the extent of their musical sophistication, one would immediately recognize that "Pretty Woman" [the derivative work]

was modeled after "Oh, Pretty Woman" [the copyrighted work]." R. 14: Declaration of Earl Speilman ¶ 8.

In addition to the conflicts over the substantiality of the taking, the evidence was also in conflict about the effect on the market for Acuff-Rose's work, although the district court found that Acuff-Rose had not produced "convincing evidence" to disprove Petitioners' defense of fair use. R. 25: Memorandum Opinion at 14. Acuff-Rose submitted the affidavit of its Director of Licensing, Gerald E. Teifer, who stated:

> If The 2 Live Crew's derivative work should become widespread, it would further impair the value of the copyrighted work, and future opportunities for licensing it.

R. 15: Declaration of Gerald Teifer at ¶ 12. Teifer also stated that Acuff-Rose's income from the copyrighted work and the market for the copyrighted work extended beyond the market for Roy Orbison's recording of it. *Id.* at ¶¶ 10 and 11. Such potential markets as movies, other productions, advertising, and marketing campaigns were listed by Teifer as examples of Acuff-Rose's income sources from the copyrighted work. R. 15: Declaration of Gerald Teifer at ¶ 10.

In contrast, Petitioners submitted only the conclusory opinions of its two experts about intended audiences. These affidavits concluded that the intended audience for one of the uses Acuff-Rose has made of its copyrighted work, Roy Orbison's recording, and the intended audience for one of Petitioner's uses of the derivative work, a recording on *As Clean As They Wanna Be,* were not the same audiences. R. 4: Affidavit of Oscar Brand ¶¶ 18-19; R. 8: Affidavit of William Krasilovsky ¶ 3c. Krasilovsky stated that "the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew

version." R. 8: Affidavit of William Krasilovsky at ¶ 3c. *See* discussion at Part IV, *infra.* The contents listed on the label of the *As Clean As They Wanna Be* album represent to the public that the album contains the copyrighted work, as written by Roy Orbison and William Dees. R. 7: Affidavit of Luther Campbell, Exhibit C.

E. Discovery

The Petition ignores the discovery requests that were outstanding at the time the dispositive motion was decided by the district court. Acuff-Rose served discovery requests in this case along with the complaint. Petitioners failed to respond timely and properly to Acuff-Rose's discovery, and Acuff-Rose filed a motion to compel during the pendency of the dispositive motion. R. 20: Motion to Compel. The motion to compel was never decided because, on January 14, 1991, the district court granted partial summary judgment to the Petitioners. R. 25 : Memorandum of the Court.

F. Interpleader

Throughout this litigation, Petitioners have sought to demonstrate (presumably) their good faith based on their offer to pay statutory mechanical royalties and the fact that they interpleaded funds into the district court. The statement of the case in the Petition gives less than a complete explication of this point. Petitioners moved to deposit with the district court the money Petitioners said they owed to Acuff-Rose: an amount of money calculated based on the statutory mechanical rate under the Copyright Act. App. 4a, n. 3: R. 6: Motion to Deposit Funds. The court accepted the interpleader. R. 11: Order. Significantly, Petitioners made no effort to calculate or pay any amounts due or any amounts owed until after this lawsuit was commenced. R. 7: Affidavit of Luther Campbell ¶ 5.

When the district court issued its memorandum opinion finding that the Petitioners' unlicensed use of "Oh, Pretty Woman"

was a fair use, it reserved the question of the "adequacy" of the compensation interpleaded by Petitioners. The district court requested briefing on entitlement to the interpleaded funds and on additional market effects after issuing its Memorandum Opinion. R. 43: Order. With that brief, Acuff-Rose submitted an affidavit detailing actual, unlicensed, and commercial uses that had been made of "Oh, Pretty Woman" following the determination that the substantial copying by Petitioners was proper. R. 45: Declaration of Jerry Flowers.[4] Despite this additional evidence of the adverse market effects suffered by Acuff-Rose, the district court confirmed its finding of fair use. R. 47: Order.

The district court returned the interpleaded mechanical royalties to the Petitioners. *Id.*

SUMMARY OF ARGUMENT

Rule 10.1 of the Rules of the Supreme Court delineate the special and important circumstances in which this Court will grant a petition for certiorari. Petitioners' argument presents none of these circumstances. Petitioners claim that certain cases decided by this Court have overruled cases decided by the courts of appeal.

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4. Among the uses Flowers noted were, on April 4, 1991, a radio station aired a song "Is That A Woman" that was based on "Oh, Pretty Woman." R. 45: Declaration of Jerry Flowers at ¶ 24. "Is That A Woman" used the entire melody, the opening guitar refrain, and the overall structure of "Oh, Pretty Woman" unaltered, and merely changed the lyrics. *Id.* In addition, a Nashville club used "Oh, Pretty Woman," with altered lyrics, as its advertising theme song. *Id.* at ¶ 26. Another rap group, Brother Makes 3, prepared a recording incorporating large segments of the copyrighted work. *Id.* at ¶¶ 27-31. Before the court's approval of the Petitioners' use, no such unauthorized uses had been reported. *Id.* at ¶¶ 23, 32. Each of these types of use had in the past been the source of potential licensing income to Acuff-Rose. *Id.* at ¶¶ 9-22; *see* R. 15: Declaration of Gerald Teifer ¶ 10.

Even assuming for purposes of argument that this supposition is correct, any inconsistency between the decisions of the courts of appeal and later decisions of this Court is not a reason for this Court to grant certiorari.

Petitioners claim that the Court of Appeals for the Sixth Circuit wrongly decided this case, but they do not claim that the lower court's decision "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision." Further, the Sixth Circuit did not decide an important question of federal law that has never been addressed by this Court. Petitioners are essentially dissatisfied that the judgment of the court below was unfavorable to them.

Finally, although not framed as one of the issues, Petitioners do claim a conflict between the circuit courts of appeal. As demonstrated herein, no such conflict exists.

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY APPLIED THIS COURT'S DECISIONS IN *SONY CORP. OF AMERICA V. UNIVERSAL CITY STUDIOS, INC.*, 464 U.S. 417 (1984) AND IN *HARPER & ROW PUBLISHERS, INC. V. NATION ENTERPRISES*, 471 U.S. 539 (1985) IN DECIDING THIS CASE.

A. Sixth Circuit's Application of Precedent

Petitioners argue that the court below did not properly apply this Court's decisions in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). Petitioners are wrong. The Court of Appeals for the Sixth Circuit quoted from and properly applied the analysis from those cases. The fact that Petitioners are not pleased with the result of that analysis is not equivalent to a misapplication of those opinions.

The Sixth Circuit held:

> The use of a copyrighted work primarily for commercial purposes has been held by the Supreme Court to be presumptively unfair. *Sony Corp.*, 464 U.S. 417, 449 (1984). . . . "While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain." *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981). The Supreme Court explained that "[t]he crux of the profit/

> nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."

Harper & Row, 471 U.S. at 562. App.12a.

Petitioners do not explain how the Sixth Circuit misapplied this doctrine. In fact, both the trial court and the Sixth Circuit found that Petitioners' primary goal in releasing the record was to sell its music. App. 12a; 754 F. Supp. at 1154. Contrary to the implication in the Petition, the Sixth Circuit specifically stated that the commercial purpose itself was *not* controlling on the issue of fair use. App. 12a. The Sixth Circuit properly applied the presumption that a commercial use is unfair and looked for rebuttal of that presumption:

> Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair. We are asked to then consider whether 2 Live Crew met its burden to rebut the presumption. . . .

App. 13a.

Petitioners may not like the Sixth Circuit's judgment, but it is undisputed that the purpose and character of Petitioners' derivative work were commercial. App. 12a: R. 25: Memorandum Opinion at 6. A commercial use "is presumptively . . . unfair" and "tends to weigh against a finding of fair use." *Sony Corp.*, 464 U.S. at 451; *Harper & Row*, 471 U.S. at 562. In addition, the finding of a commercial use raises a presumption that the fourth factor, effect

on the potential market, will also weigh against fair use. *Sony*, 464 U.S. at 451. Here, Petitioners could not rebut the presumption.

Many commentators have suggested an economic model for a fair use privilege. *See Harper & Row*, 471 U.S. 539, 566 n. 9 (1985) (collecting articles and noting that economic analysis led to correct result). If the use is one by which a profit can be made, then the copyright owner should keep that profit. A decision by a rational copyright owner not to seek a profit is driven by the conclusion that greater reward is possible by forgoing the use. *See Goldstein v. California*, 412 U.S. 546, 549 (1973) (part of the reward is control over use).

In addition, this Court has noted with approval the economic theory that a fair use privilege should not be applied if there is a functioning market for the use. *Harper & Row*, 471 U.S. at 566. *See* Sanders and Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 Fordham Ent., Media & Intell. Prop. L. F. 11 (1990) (there is a functioning market for parody uses).

At one point, Petitioners assert that the instant case is distinguishable from *Harper & Row* and *Sony* because neither of those cases involved "creative derivative works" and this Court should therefore grant review. This argument is not persuasive on the issue of whether certiorari should be granted for two reasons. First, whether this case is *factually* distinguishable from *Harper & Row* and *Sony* is not an issue meriting this Court's review where the legal issues are the same. Moreover, the infringing work in *Harper & Row*, a magazine article based on a book, was a derivative work as that term is used in the Copyright Act. *See* 17 U.S.C. § 101.

Petitioners simply do not explain how the Sixth Circuit "misapplied" this Court's precedent, other than a bare assertion that the lower court "misapplied" and "strengthened" the presumption that commercial uses are unfair. Petition at 9.

Petitioners do not and, indeed, cannot argue that their work was not for commercial purposes. Moreover, they do not and cannot argue that the Sixth Circuit converted the presumption into an "irrebuttable" one. Instead, Petitioners assert that the opinion below "implies if it does not directly state that prior Second and Ninth Circuit precedent has been overruled" by the decisions in *Sony* and *Harper & Row*. As demonstrated below, there is no conflict between the circuit courts of appeal regarding the application of the presumption.

Second, assuming *arguendo*, that there are significant factual distinctions between *Sony* and *Harper & Row* and the instant case, those distinctions are without a legal difference.[5] This Court's holdings regarding the proper interpretation of the four fair use factors contained in 17 U.S.C. § 107 are clear, and this Court should not be expected or required to reaffirm those holdings for every different possible, different, factual scenario or category of fair use. Petitioners would turn this Court into a court of original jurisdiction, forcing it to consider the application of settled law to various factual scenarios. The Petition should be denied.

B. Conflict Between The Circuits

Petitioners assert that the Sixth Circuit is at odds with the courts of appeal for the Second and Ninth Circuits because the Sixth Circuit's opinion in this case "effectively holds that commercial musical parody of a copyrighted work is a misappropriation of the copyrighted work." Petition at 8. To the contrary, the Sixth Circuit explicitly held that "[c]ommercial purpose is not itself controlling on the issue of fair use. . . ." App. 12a. Petitioners have misstated the holding below.

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5. Indeed, Petitioners cited *Harper & Row* as authority to the Sixth Circuit in their brief. Appellees' Brief to Sixth Circuit at 16 and 39.

Furthermore, without quotation or citation of the opinion, Petitioners contend that the decision below "outlaws" musical parody. Petition at 9. Moreover, the Petition implies that all "parodies" have always been considered fair uses, especially in the Second and Ninth Circuits. That is manifestly not the case. *See, e.g., New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1530 (S.D.N.Y. 1988); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). The Sixth Circuit acknowledged the place of parody in entertainment but correctly refused to indulge the Petitioners' suggested rewriting of § 107. "Much of entertainment involves parodies in the popular sense, but section 107 does not direct the courts to conclude that all such parodies are fair uses." App. 10a.

Petitioners also argue that the decision of the Sixth Circuit is inconsistent with specific decisions of the Second and Ninth Circuit Courts of Appeal, *citing, Berlin v. EC Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); and *Elsmere Music Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980). Petition at 8. This is not the case and to the extent that Petitioners imply that "musical parody" is entitled to or somehow receives special treatment from those circuits, the Petition is incorrect.[6]

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6. *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) expanded the amount of permissible copying when a privilege is sought for unlicensed parody from the "recall or conjure up" test to a "necessary to accomplish reasonably its parodic purpose" test. 794 F.2d 432, 439. *Fisher* based its analysis of substantiality on a footnote in the Second Circuit's opinion in *Elsmere Music. Id.* (*citing Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n. 1 (2d Cir. 1980)). The footnote was pure dicta, hypothesizing that the "recall or conjure up" test established in *Berlin v. EC Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), could be too restrictive in some cases.

The Second Circuit repudiated its *Elsmere* speculation in *Warner Bros. Inc.*
(Cont'd)

Petitioners contend that *Sony* and *Harper & Row* "overrule" certain cases from the Second and Ninth Circuits. However, *Fisher* was decided the year after *Harper & Row* and two years after *Sony*. It goes without saying that cases decided first cannot overrule later decisions. Furthermore, if the courts of appeal for those circuits believed that their decisions had been overruled, surely there would have been some discussion of that in the cases decided since *Sony* and *Harper & Row*, especially where *Sony* is cited. To the contrary, in *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992), the court made practically the identical analysis that the Sixth Circuit made, without mentioning that *Sony* and *Harper & Row* "overruled" its past cases. *See also, Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984) (since use was of commercial nature, harm to [plaintiff] could be presumed, *citing Sony*).

(Cont'd)
v. American Broadcasting, Inc., 654 F.2d 204 (2d Cir. 1981). In that case, the Second Circuit directed the district court to allow a narrower scope of similarity in a parody case than the district court had posited. On preliminary injunction hearing, the district court found no substantial similarity between Superman and the Greatest American Hero. *Warner Bros, Inc. v. American Broadcasting, Inc.*, 523 F. Supp. 611 (S.D.N.Y. 1981). However, the district court went on to note that even if the similarity was later proved to be substantial rather than isolated, a parody defense might still be available.

The Second Circuit affirmed the denial of a preliminary injunction based on a lack of likelihood of success on the merits but "believe[d] it prudent to note our reservations in connection with . . . [the] discussion of the parody defense." 654 F.2d at 211. The Second Circuit found that a privilege "might be applicable" to a case involving *isolated* direct copying but expressed doubt about the propriety of the privilege *when an entire work was permeated with copying and the same media* were involved. 654 F.2d at 211.

The further implication that the law regarding fair use has a smooth and uninterrupted legal history is obviously far from correct.

Finally, at its most basic, Petitioners' argument is that because some other cases involving musical parody have been determined to be fair uses, the Petitioners' use in this case should be excused under § 107. It is simply does not follow that all musical parodies are fair uses, or that any decision from another circuit finding a musical parody to be an unfair use is "in conflict" as that term is used in Rule 10.1(a). "Nor will differences between two circuits likely be accepted as a sufficient conflict 'if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved.' " 12 J. Moore, *Moore's Federal Practice* ¶ 810.21 (2d ed. 1981) quoting Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 (1958). Petitioners are confusing legal standards with the application of the law to the facts of a particular case.

The opinion below reaffirmed the exclusive rights granted to a copyright owner under § 106 of the Copyright Act. The opinion does not "outlaw" musical parody and is not at odds with decisions from either the Second or Ninth Circuits. In fact, the Sixth Circuit cites decisions from both of those circuits as support for its opinion — including *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Elsmere Music v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980); *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). The opinion below properly applied the presumption enunciated by this Court in *Sony* and reaffirmed in *Harper & Row*. The fact that the presumption worked against Petitioners is not a basis for this Court to review the case.

II.

THE APPLICATION OF RULE 301 OF THE FEDERAL RULES OF EVIDENCE IS NEITHER PROPERLY BEFORE THIS COURT NOR RELEVANT TO THIS CASE.

Petitioners argue that the Sixth Circuit has ignored or repudiated Rule 301 of the Federal Rules of Evidence. This argument fails to merit a grant of certiorari on both procedural and substantive grounds. Initially, this argument is not properly before this Court. Rule 301 of the Federal Rules of Evidence was never before mentioned in this action, either to the trial court or to the court of appeals. Ordinarily, the Supreme Court does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 233-34 (1976).

Further, substantively this issue does not merit Supreme Court review under the dictates of Rule 10.1 of the Rules of the Supreme Court. Petitioners' second argument is indistinguishable from their first — Petitioners disagree with the effect of the Sixth Circuit's application of the presumption that commercial use is unfair. Petitioners claim that the Sixth Circuit has [implicitly] rejected Rule 301 of the Federal Rules of Evidence, and has thereby created an irrebuttable presumption in cases such as this. Even a cursory reading of the opinion shows that this is not the case. The Sixth Circuit cited the presumption from *Sony* and applied it in this case. App. 12a-13a. Far from creating an irrebuttable presumption of unfair use, the court specifically acknowledged that the presumption could be overcome and suggested the means for the presumption to be overcome.

> Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the

> use is unfair. We are asked to then consider whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the "parody does not unfairly diminish the economic value of the original."

App. 13a *citing Fisher v. Dees,* 794 F.2d 432, 437 (9th Cir. 1986).

Obviously, the court below has not created an irrebuttable presumption in conflict with the Rules of Evidence. This argument does not justify review by this Court.

III.

THE COMMERCIAL PURPOSE OF A DERIVATIVE WORK WEIGHS AGAINST A FINDING THAT THE USE OF THE UNDERLYING COPYRIGHTED WORK IS FAIR.

Petitioners recast the presumption argument a third time, this time in the form of a suggestion that a new factor be considered in fair use determinations. Petition at 16-20. Petitioners urge this Court to provide parody special consideration over and above the statutory fair use considerations. Acuff-Rose does not dispute that Congress has authorized, and occasionally courts have considered, factors other than the four mandated for consideration by 17 U.S.C. § 107. *See Harper & Row* at 560.

However, the new consideration suggested by Petitioners is one neither worthy of nor properly presented for this Court's attention. Once again, this issue was not presented to the Sixth Circuit or to the trial court. Ordinarily, the Supreme Court does not decide questions not raised or resolved in the lower court. *Youakim v. Miller,* 425 U.S. 231, 233-34 (1976).

Additionally, this Court should reject this invitation to legislate judicially a new category of protection under 17 U.S.C. § 107.[7] Petitioners argue that their work is protected parody and put their work on a par with other examples of parody in American and British literary and musical history, apparently under the mistaken impression that none of these other works would be permissible under the Sixth Circuit's analysis. The Sixth Circuit decision does not support such a tortured reading. The Sixth Circuit merely applied the presumption and held that the Petitioners had not overcome it under the facts of this case.

Apparently, Petitioners would rewrite the statute so that the initial presumption that a commercial derivative work is unfair can be overcome by a simple assertion that the derivative work is "a parody." Proper parody in the legal sense[8] is already the beneficiary of extra protection under the Copyright Act. Congress provided that protection in the fair use section — 17 U.S.C. § 107. Petitioners do not explain why parody, as a distinct category, is deserving of even more protection. Significantly, Petitioners do not point to any other class of work that receives any "heightened" protection under § 107. Congress has provided significant and sufficient protection for parody in that section of the Copyright Act. That Petitioners produced a work that goes beyond the parameters of this protection does not mean this Court should review this case.

The issue of the application of the fair use factors is not an "important question of federal law which has not been, but should be, settled by this Court." On two recent occasions, in *Sony* and

---

7. Parody, as such, is not one of the specific examples of fair use listed in § 107. It has arisen under the privileges granted for criticism and comment and from the legislative history. App. 9a-10a.

8. *See* footnote 3, *supra.*

Harper & Row, this Court has specifically discussed the issue of how the first of the four fair use factors should be analyzed and applied. There is nothing to be gained by revisiting the issue.[9] The Sixth Circuit's opinion makes clear that the presumption can be overcome within the framework established by the Congress, as analyzed in opinions of this Court.

The standards established by this Court on the fair use issue are clear. The various courts of appeal have applied those standards. *See, e.g., Rogers v. Koons* at 309. This issue is settled. Certiorari should be denied.

IV.

CONSIDERATION OF THE EFFECT ON THE POTENTIAL MARKET FOR OR VALUE OF A COPYRIGHTED WORK IS PROPER TO DETERMINE WHETHER A PARTICULAR USE OF A COPYRIGHTED WORK IS FAIR.

In criticizing the Sixth Circuit's market analysis of the fourth fair use factor, the effect of the use upon the potential market for or value of the copyrighted work, Petitioners focus almost exclusively on the unlikelihood that Petitioner's "Pretty Woman" would fulfill the demand for Acuff-Rose's "Oh, Pretty Woman." Simply put, Petitioners are asserting that because Acuff-Rose has not made or has not licensed a parody of "Oh, Pretty Woman" in

9. Petitioners' argument on this issue is rife with speculation and materials that are not in the record. For example, whether other groups creating "parodies" seek permission is not in the record, except for a reference to "Weird Al" Yankovic, made by Petitioners in their letter to Acuff-Rose. In point of fact, Mr. Yankovic does seek and receives permission to perform parodies of popular works. *See* footnote 2, *supra*. Petitioners imply that the nature of their work precluded the grant of permission. There is no evidence in the record on this point.

competition with Petitioners' "Pretty Woman," somehow Acuff-Rose's market has not been damaged. Petitioners further speculate that Acuff-Rose "had no reasonable expectation of developing a parody which criticized and mocked this time-honored rock-n-roll ballad." Petition at 21.

What Petitioners fail to acknowledge is that analysis under the fourth fair use factor is not limited solely to a "fulfills the demand" or substitution standard. Rather, the analysis includes a complete examination of the potential harm to the market for or value of the original copyrighted work, engendered by the claimed fair use. The Court of Appeals for the Sixth Circuit, citing this Court's decision in *Sony*, correctly observed:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed.

App. at 16a, *citing Sony*, 464 U.S. at 451.

Petitioners' reliance upon the "fulfills the demand" or substitution standard is misplaced. In *Harper & Row* this Court held:

> More important, to negate fair use one need only show that if the challenged use "should become widespread, it would adversely affect the *potential* market for the copyrighted work."

Harper & Row, 471 U.S. at 569. The Court of Appeals for the Sixth Circuit properly applied the direction of this Court, stating that the "focus is on *potential* harm . . . ." App. at 16a.

Moreover, Petitioners attempt to bolster their position on the market effect by claiming that the Court of Appeals for the Sixth Circuit's decision is inconsistent with the analysis used in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986). The *Fisher* court did limit its analysis to a "fulfills the demand" or substitution standard. However, in *Hustler Magazine Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986) which was decided approximately a month after *Fisher*, the Ninth Circuit returned to the full statement of effect on the potential market, including the market to license derivative works, such as parodies. *Hustler Magazine, Inc.*, 796 F.2d at 1155-56.

Additionally, this Court has warned on more than one occasion that the analysis under the fourth fair use factor "must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, 471 U.S. at 566. The Court of Appeals for the Sixth Circuit properly applied this Court's mandate, stating that:

> [a]lthough we have already determined that harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses, we note that the inquiry under the fourth statutory factor not only considers harm to the market for the original but harm to the market for derivative works as well.

App. at 17a.

After citing an example from *Rogers v. Koons*, where the Court of Appeals for the Second Circuit examined the effect of a motion picture on the potential sale of adaptation rights for a book, the Sixth Circuit, in this case, dismissed as irrelevant the conclusion that "it is unlikely that 2 Live Crew's song could adversely affect the market for the original." The Sixth Circuit, after applying this Court's directives, properly concluded that "the record on this factor does not support a finding of fair use." App. 17a.

The various courts of appeal are in agreement and have followed Congress' statutory formulation of the fourth of the fair use factors. Contrary to Petitioners' position, this consideration is not limited to market substitution. No reason exists for this Court to reaffirm what Congress and the courts of appeal have clearly and consistently acknowledged. The Petition should be denied.

CONCLUSION

Wherefore, based on the foregoing, the Respondent, Acuff-Rose Music, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 92-1292

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE CAPITOL STEPS PRODUCTIONS, INC. AND MARK RUSSELL IN SUPPORT OF PETITIONERS

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Petitioners,

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of this Honorable Court, Capitol Steps Products, Inc. ("The Capitol Steps") and Mark Russell move for leave to submit briefs as *amici curiae* in support of the Petitioner in this matter. Their brief in support of the Petition for a Writ of Certiorari focuses on the effect which the Sixth Circuit's holding in this case will have on the art of musical parody, and provides information not contained in the Petitioner's brief regarding the significance of musical parody to the nation. Because both Mr. Russell and The Capitol Steps are, as more fully described below, directly engaged in the busi-

ness of musical parody, they will be directly and personally affected by the Court's decision in this case. Both of them participated as *amici curiae* in proceedings before the Court of Appeals for the Sixth Circuit in this matter. The Petitioner has granted permission for the filing of this brief, which consent is on file, but the Respondent has refused permission.

STATEMENT OF INTEREST

Your *amici curiae* have a significant interest in the outcome of this case. The Capitol Steps have been performing, in Washintgon, D.C. and nationally, for eleven years. Declaration of William A. Strauss, hereinafter "Strauss Dec.," attached to the brief as Appendix A, at ¶¶ 1-2. A Capitol Steps performance consists primarily of song parodies, principally of copyrighted songs. The parodies, which generally have a high current political content, range in length from a few bars to an entire parody rendition. Recent examples keyed to the Presidential campaign were "I Wanna Be Your Pander Bear," and "I've Taken Stands on Both Sides Now," satirical jabs at President Clinton and former President Bush, respectively. Strauss Dec. ¶ 3.

Mark Russell has been performing parody in the Washington, D.C. area and nationally for nearly 40 years. He regularly appears on national network radio and television. For the past 18 years, he has hosted his own "Mark Russell Comedy Specials" on public television. Declaration of Alison K. Russell, hereinafter "Russell Dec.," attached to the brief as Appendix B, at ¶¶ 2-3. Along with spoken material, Mark Russell performs song parodies to both copyrighted and original melodies. One of his recent parodies of a copyrighted work is "We're Just Wild About Harry" to the tune of "I'm Just Wild About Harry," a satirical look at how both President Clinton and former President Bush invoked the name of Harry Truman during the campaign. Russell Dec. ¶ 5.

Neither The Capitol Steps nor Mark Russell seek or obtain licenses from copyright owners for their song parodies. They take this position for several reasons: First, both have been advised that their parodies of copyrighted songs constitute a "fair use" of the copyrighted materials. Strauss Dec. ¶ 4; Russell Dec. ¶ 6. Second, the very nature of social and political satire makes it impossible to obtain timely permission. Both perform topical political satire based on current political events; the process of asking for and receiving permission would make it impossible for them to perform the kind of current repertoire which their audiences have come to expect. Russell Dec. ¶ 7; Strauss Dec. ¶ 8.

Finally, asking permission would also be interpreted by music publishers as a request for an endorsement of the political ideas contained within the lyrics. Since the political views contained within a sing are solely those of the parodist, no endorsement is needed or wanted. Obviously, there may be copyright holders who do not endorse the political views expressed in a specific Mark Russell or Capitol Steps song parody. Moreover, many copyrights are owned by large corporations with extensive interests and involvement in the national political process. These corporations are generally reluctant to appear to endorse a song which embarrasses the current administration, or a powerful Senator or Member of Congress. A requirement that political parodists obtain, or attempt to obtain permission before signing or recording a particular song would make it nearly impossible to perform political song parody. Russell Dec. ¶¶ 6-8; Strauss Dec. ¶¶ 6-8; Strauss Dec. ¶¶ 4-7.

In view of the above facts, the interest of *amici* in the pending proceeding is clear: if it is unlawful for 2 Live Crew to sing the song parody "Pretty Woman" except with the permission of the copyright owners to the underlying work, then it may be unlawful for the Capitol Steps to sing "I've Taken Stands on Both Sides Now" without permission from the copyright owner of "I've Looked at

Life from Both Sides Now," or for Mark Russell to sing "We're Just Wild About Harry" without permission from the copyright owner of "I'm Just Wild About Harry." In fact, under the ruling of the Court below, it would be effectively impossible for the *amici* or any of the other hundreds of well known and less well known parodists operating in the musical genre to perform at all, thereby impoverishing the world of both music and political discourse. Accordingly, *amici* have a strong and direct interest in the granting of this Petition for a Writ of Certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
ARGUMENT	4
I. THE SIXTH CIRCUIT'S INTERPRETATION OF THE FAIR USE STATUTORY FACTORS IS AT ODDS WITH THE SETTLED LAW REGARDING PARODIES, PARICULARLY AS THAT LAW HAS BEEN TRADITIONALLY FORMULATED IN THE SECOND AND NINTH CIRCUITS	4
A. The Sixth Circuit Erred in Finding That the Commercial Nature of a Parody Was Dispositive of the First Statutory Fair Use Factor	5
B. The Sixth Circuit Misapplied the Substantiality Test as It Pertains to Song Parodies	7
C. The Sixth Circuit Erred in Its Evaluation of the Fourth Statutory Fair Use Factor by Creating an Irrebuttable Presumption That a Commercial Parody Will Harm the Copyrighted Work	9
D. The Argument That a Parody Interferes With the Right of a Copyright Owner to Profit From Its Own Parodies Is Without Merit	11
II. THE FORMULATION OF FAIR USE ADOPTED BY THE SIXTH CIRCUIT WOULD MAKE POLITICAL SONG PARODY DANGEROUS OR IMPOSSIBLE	13
CONCLUSION	16
APPENDICES	
Appendix A: Declaration of William A. Strauss	1a
Appendix B: Declaration of Alison K. Russell	5a
Appendix C: Declaration of William A. Strauss	9a

TABLE OF AUTHORITIES

CASES	Page
Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964)	2, 5
Elsmere Music, Inc. v. Nat'l Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), *aff'd* 623 F.2d 252 (2d Cir. 1980)	2, 5, 8
Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986)	2, 5, 8
Folsom v. Marsh, 9 F. Cas. 342 (No. 4,901) (CC Mass.)	12
Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539 (1985)	6, 7, 9, 10, 12
MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981)	4
Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)	10
Sony Corp. v. Universal City Studios, 464 U.S. 416, 104 S. Ct. 774 (1984)	10
Walt Disney Prod. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom., O'Neill v. Walt Disney Productions*, 439 U.S. 1132 (1979)	4
STATUTES	
17 U.S.C. § 107	2, 4, 6, 11
17 U.S.C. § 115	2
Fed. R. Evid. 301	9, 10
TREATISES	
3 *Nimmer on Copyright* § 13.05[C] (1992)	13
10 J. Moore & H. Bendix, *Moore's Federal Practice* § 301.04[4.-1] (2d ed. 1988)	10
OTHER AUTHORITIES	
Committee on the Judiciary, House Report No. 94-1476, 94th Cong., 2d Sess. (1976)	6
G. Smith, *Joe Hill*, Salt Lake City, University of Utah Press (1969)	14, 15
V. Lawrence, *Music for Patriots, Politicians, and Presidents*, New York, McMillan (1975)	15
Wall Street Journal, Sept. 5, 1990	15

IN THE

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OCTOBER TERM, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
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v.

ACUFF-ROSE MUSIC, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF CAPITOL STEPS PRODUCTIONS, INC. AND MARK RUSSELL AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Capitol Steps and Mark Russell submit this brief as *amici curiae*, and respectfully suggest that this Court grant the Petition, and reverse the decision below.

STATEMENT OF INTEREST

The Statement of Interest is included in the Motion for Leave to File Brief Amici Curiae in Support of Petitioner, *ante*.

SUMMARY OF ARGUMENT

To prevent copyright protection of intellectual property from becoming a straightjacket, courts and the Congress have developed the doctrine of "fair use," which provides that copyrighted material may be quoted or copied verbatim under certain conditions. "Fair use" status has regularly been granted to those who quote from copyrighted works to explain or critique them, and to those who parody copyrighted works.

The song parodist routinely appropriates more of a work than other beneficiaries of the fair use doctrine. Anyone is free to record a copyrighted song by paying the statutory mechanical copyright fee. But the parodist who, by definition, modifies the lyric (and sometimes the tune) to make his point cannot qualify for the compulsory license provided by Section 115 of the Copyright Act, 17 U.S.C. § 115.[1] Thus, unless the parody is treated as a "fair use," the parodist must obtain permission from the copyright owner. Such permission is rarely granted.

A line of decisions in the Second and Ninth Circuits—home to major entertainment centers—have found parodies to be "fair use." *See, e.g., Elsmere Music, Inc. v. Nat'l Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd* 623 F.2d 252 (2d Cir. 1980); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964). These Second and Ninth Circuit opinions have for many years constituted the "bill of rights" for song parodists.

The "fair use" doctrine is now codified at 17 U.S.C. § 107, which provides in relevant part that:

---

[1] Section 115 provides for the so-called "mechanical license," which allows anyone to make a copy of a phonorecord, subject only to the requirement that pre-set royalties be paid. The right to use Section 115 is limited; while "arrangements" are allowed, "the arrangement may not change the basic melody or fundamental character of the work." 11 U.S.C. § 115(a)(2).

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes:
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

In this case, the Sixth Circuit has found that a song parody did not constitute fair use. It made this determination almost entirely on the basis of a finding that the parody was recorded for a "commercial" purpose. The test applied by the Sixth Circuit effectively rendered the four factor test embodied in the statute moot by holding that the "commercial" nature of the parody was dispositive. In particular, the Court below impermissibly established an irrebuttable presumption that the "commercial" purpose of a parody mandated a finding that the parody caused economic harm to the copyright holder.

This emphasis on "comercial" purpose disregards the statutory language, and renders the statutory balancing tests meaningless. The new test applied by the Sixth Circuit would bring an end to musical political parody as it has existed since the time of the Revolution, and allows censorship by copyright of protected speech.

ARGUMENT

I. THE SIXTH CIRCUIT'S INTERPRETATION OF THE FAIR USE STATUTORY FACTORS IS AT ODDS WITH THE SETTLED LAW REGARDING PARODIES, PARTICULARLY AS THAT LAW HAS BEEN TRADITIONALLY FORMULATED IN THE SECOND AND NINTH CIRCUITS.

In any fair use case involving an asserted parody, the first question is whether the song or other work in question is a parody at all. Here the Sixth Circuit answered that question in the affirmative, as did the District Court. Petition App. A at 10a; Petition App. B at 42a. Accordingly, those cases in which courts have found that parody (or another form of fair use) did not exist, including *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); and *Walt Disney Prod. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom., O'Neill v. Walt Disney Productions*, 439 U.S. 1132 (1979), are inapposite to this case. Instead, the Court was required to examine the statutory fair use factors set forth at 17 U.S.C. § 107, and such other factors as it found relevant, to determine whether the parody by 2 Live Crew of Acuff-Roe's song was "fair." This the Court did; however, at least in applying the first, third, and fourth factors, it established tests which are both impossible to meet for any commercial song parody, and squarely at odds with those factors as enunciated by the Second and Ninth Circuits.

The analysis used by the Sixth Circuit, particularly with respect to the first and fourth statutory fair use factors, would mandate a finding of no fair use for any commercial parody, not just 2 Live Crew's parody of "Pretty Woman."

A. The Sixth Circuit Erred in Finding That the Commercial Nature of a Parody Was Dispositive of the First Statutory Fair Use Factor.

The first of the four fair use factors is:

> (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes. . . .

Both the majority and the dissent in this case concluded that the purpose of the 2 Live Crew song "Pretty Woman" was parody, and that its character was commercial. Petition App. A. at 10a-12a and App. B. at 40a-42a. The difference between them lies in whether the fact of commercial use was treated as dispositive for purposes of utilizing this factor: the majority held that once a commercial use was found, the status of the work as parody was irrelevant;[2] the dissent held that commercial use, *per se*, did not determine whether this fair use factor was present or absent.

Traditionally, real song parodies, nearly all of which are done in part for a commercial purpose, are accorded no less respect for that reason than hypothetical, noncommercial parodies. Indeed, the cases governing parody as a fair use *all* involve commercial parodies. *See, e.g., Elsmere* (parody by commercial television network found to be fair use); *Fisher* (parody by commercial radio station personality found to be fair use); and *Berlin* (parody by commercial magazine found to be fair use). These decisions by the Second and Ninth Circuits have uniformly held that the commercial nature of the parody, by itself, would not act to bar the fair use defense.

---

[2] While the Court below discussed balancing purpose and character, it found "that the admittedly commercial nature of the derivative work—the *purpose* of the work being no less important than its *character* in the Act's formulation—requires the conclusion that the first factor weighs against a finding of fair use." Petition App. A at 13a. (Emphasis in original).

The Sixth Circuit's holding below rejects this long-standing treatment of parody as fair use, and establishes what amounts to a bright line test—if a parody is produced for a commercial purpose, it is not a fair use. Had Congress intended the result reached by the majority, it could have simply written the first factor as "whether such use is of commercial nature or is for nonprofit educational purposes." It did not do so.

In formulating the statutory fair use doctrine contained in 17 U.S.C. § 107, Congress appears to have focused on the degree to which copyrighted works could be mechanically or electronically copied and used without payment of royalties. Much of the discussion centered on whether a schoolteacher could copy portions of a book for use by her class. The dependent clause referencing the commercial or non-profit nature of a use was added largely to expand "fair use" to this area, not to limit the prior scope of fair use treatment:

> The Committee has amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an expressd recognition that, as under the present law, the commercial of non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighted along with other factors in fair use decisions.

Committee on the Judiciary, House Report No. 1476, 94th Cong., 2d Sess. 66 (1976).

In reaching its unprecedented decision to afford controlling weight to the commercial character of a parody, the majority opinion relied heavily on *Harper & Row Pubishers v. Nation Enterprises*, 471 U.S. 539 (1985).

Yet nothing in this Court's decision in that case compels, or even suggests, an intent to overturn prior law on this point.

The Court weighed three factors in *Harper & Row* to determine the nature and character of the challenged use: the fact that the challenged use entailed news reporting; the fact that *The Nation* was a commercial magazine; and the fact that it had "the *intended purpose* of supplanting the copyright holder's valuable right of first publication." *Id.* at 562. (Emphasis in original.) It was clearly this last fact, and not the second, which tilted this Court's decision on the first fair use factor toward Harper & Row: "In evaluating character and purpose we cannot ignore *The Nation*'s stated purpose of scooping the forthcoming hardcover and *Time* abstracts." *Id.* By contrast, in this case, no such intention to supplant or "scoop" the original melody of "Oh, Pretty Woman" has been found on the record of this case, or has even been alleged.

B. The Sixth Circuit Misapplied the Substantiality Test as It Pertains to Song Parodies.

The third statutory factor is:

> (3) the amount and substantiality of the portion used in relation to the copyrighted work a as whole. . . .

The use of this statutory factor in the case of parody is, as the dissent has recognized, "problamatical." Petition App. A at 29a. A parody, by its nature, must "conjure up" a sufficient portion of the copyrighted work to be recognizable as parody.

In the specific case of song parodies, the Second Circuit has endorsed a view of the "substantiality" factor which differs markedly from the restrictive view of the majority opinion in this case:

> [T]he concept of "conjuring up" an original came into the copyright law not as a limitation on how

> much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. *Columbus Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955). A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect.

Elsmere Music, 623 F.2d at 253 n.1. Similarly, the Ninth Circuit has recognized a "special need for accuracy," in song parodies, where a change of a few notes can make the melody unrecognizable, and destroy the intended musical joke. *Fisher v. Dees*, 794 F. 2d at 439.

The majority opinion simply makes no sense when applied to a song parody. While it gives lip service to the above quotation from *Elsmere*, it also holds that the use of a substantial portion of a copyrighted work is evidence against fair use, and further that:

> The qualitative degree of the copying is even more critical than the quantitative, and we ask what degree of the essence of the original is copied in relation to its whole. [Citation omitted] We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original.

Petition App. A at 15a-16a.

The difficulty with this formulation is that every song has a recognizable tune. That time constitutes its true "heart" or "essence." It is impossible to parody the song without musically quoting its tune. On the other hand, according to the majority opinion, once one does quote this "heart," one loses (or at least does not win) on this factor of the fair use test. It appears that such a formulation would cut the "heart" out of the fair use doctrine,

insofar as parody is concerned, and once again places the Sixth Circuit's formulation of the law squarely at odds with that enunciated by the Second and Ninth Circuits.

C. The Sixth Circuit Erred in Its Evaluation of the Fourth Statutory Fair Use Factor by Creating an Irrebuttable Presumption That a Commercial Parody Will Harm the Copyrighted Work.

The fourth statutory factor is:

> (4) the effect of the use upon the potential market for or the value of the copyrighted work.

This Court has called this forth factor "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. Despite the importance of this factor, the copyright holders presented no evidence that the petitioners' parody had any effect on the market for their copyrighted work.[3] But the Court below determined that there was no need for evidence. Having found that 2 Live Crew's use of the copyrighted work was "wholly commercial," the Court "presume[d] that a likelihood of future harm to Acuff-Rose exists." Petition App. A at 16a.

In reaching this rather startling presumption, the majority opinion relied upon *Harper & Row*. However, an evidentiary presumption, such as that created by this Court in *Harper & Row*, has only a limited effect. Under Fed. R. Evid. 301, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense

---

[3] On the other hand, 2 Live Crew presented evidence that their parody did not constitute either a present or future danger to sales of "Oh, Pretty Woman." Petitioners made this showing through the unrebutted affidavits of Oscar Brand and M. William Krasilovsky, which are attached as Appendices to the Petition. Both experts testified that the potential customers for the 2 Live Crew parody and the original Acuff-Rose song are entirely different and distinct.

of the risk of nonpersuasion, which remains throughout the trial on the party on whom it was originally cast." The federal courts, through Rule 301, have adopted the "bursting bubble" approach to presumptions, under which the presumption vanishes, and has no further probative effect, once it has been rebutted. 10 J. Moore & H. Bendix, *Moore's Federal Practice* § 301.04[4.-1] (2d ed. 1988).

This Court found its "commercial use" presumption to be rebuttable in the very case in which it created that presumption. In *Sony Corp. v. Universal City Studios*, 464 U.S. 416, 104 S. Ct. 774 (1984), the Court first said that, "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege which belongs to the owners of the copyright." 464 U.S. at 451. The Court, however, went on to hold that the presumption had been rebutted by the respondents, through evidence showing that their commercial video technology had uses which would not unfairly exploit this privilege. The "commercial use" presumption of *Sony* and *Harper & Row* was not intended to, nor did it, overrule *sotto voce* the traditional fair use protection afforded commercial song parodies.

When the Court of Appeals reversed the District Court on this issue, it effectively declared the existence of an irrebuttable presumption that commercial use must always result in injury to the market for the copyrighted work.[4] This had the effect of collapsing yet another of the

[4] In fact, the other case principally relied upon by the majority below, *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992), reached a contrary conclusion. In that case, the Second Circuit expressly recognized that the nature of the intended audience of even a direct copy of a work could require that it be treated as a fair use. According to the Court, "fair use permits lyrics or music to be copied in a literary magazine, but where the same material is published in a song sheet magazine, purchased for playing and not simply for reading, it is an unfair use." 960 F.2d at 312. This distinction is similar to the conclusion reached by the Petitioners' expert, Oscar Brand, who concluded that the 2 Live Crew parody was intended for an entirely different audience than the original work, and could not "affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Petition App. D at ¶ 19.

four factors into a simple statement that commercial benefit is inconsistent with fair use.[5] Had Congress intended this simple and simplistic result, it could have simply stated so.

D. The Argument That a Parody Interferes With the Right of a Copyright Owner to Profit From Its Own Parodies Is Without Merit.

A crucial link in the reasoning of the Sixth Circuit that parodies must always cause economic harm to a copyright owners was its argument that the 2 Live Crew parody would impair the market for parodies by the copyright holder. The core of the Circuit Court's reasoning on this issue was its argument that 1) copyright owners have rights in derivative works as well as the original work; and 2) parodies are derivative works; therefore 3) copyright owners have rights in parodies of their own work which will be injured by the issuance of unlicensed parodies. Petition App. A at 17a.

However, the second element of this syllogism is false; parodies are, under section 107, not derivative works, but rather "comment" and "criticism" on a work. The weak-

[5] The Court below actually linked the first and fourth factors and decided them both on the basis of the presumption. When discussing the first factor, the Court implied the existence of a factual test which it later resolved by the presumption of harm:

> Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair. We are asked then to consider whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the "parody does not unfairly diminish the economic value of the original."

Petition App. A at 13a.

ness of the Court's formulation can be seen if one substitutes musical or theatrical criticism for parody. Assume that the *New York Times* writes a criticism of a copyrighted play. Clearly, this criticism is prepared and published for commercial purposes, *i.e.*, to sell newspapers and newspaper advertising. Could it then be said that the *Times* review was a copyright infringement because it unfairly interfered with the author's right to criticize his own work? This would truly be a remarkable result; yet it seems to be the result mandated by the majority's opinion.

Of course, a different issue would arise if a reviewer or parodist simply intended to appropriate the original work, and this distinction was expressly adopted in *Harper & Row*:

> As early as 1841, Justice Story gave judicial recognition to the [fair use] doctrine in a case that concerned the letters of another former President, George Washington.
>
> > "[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." *Folsom v. Marsh*, 9 F. Cas. 342, 344-345 (No. 4,901) (CC Mass.)

Harper & Row, 471 U.S. at 550. But this issue does not arise here, since the majority opinion of the Court below has already determined 2 Live Crew's intent to be parody, not piracy. Petition App. A at 10a.

In summary, a consideration of the statutory factors with an eye to the nature of parody leads inexorably to the conclusion that the parody in question was a fair use. The Sixth Circuit's contrary conclusion is insupportable on this record.

II. THE FORMULATION OF FAIR USE ADOPTED BY THE SIXTH CIRCUIT WOULD MAKE POLITICAL SONG PARODY DANGEROUS OR IMPOSSIBLE.

As the dissent in the Court below pointed out, there may be factors not listed in the statutory schema which "merit consideration by the courts in determining when parody constitutes fair use." Petition App. A at 33a. One such factor is that the Sixth Circuit's decision may, for all practical purposes, make the art of song parody impossible—or, at a minimum, very risky. For the reasons set forth in the Statement of Interest, it is virtually impossible to perform topical, political song parodies if one seeks permission for the use of copyrighted works. *See* Strauss Dec. ¶ 7; Russell Dec. ¶¶ 6-9. As Professor Nimmer has stated, a satire of a copyrighted song, "by its very nature is unlikely to be the subject of a license from the author of a serious work. Only by the recogniiton of a fair use defense is society likely to reap the benefit of this socially useful literary genre." 3 *Nimmer on Copyright* § 13.05[C] (1992). The instant case highlights this perceptive conclusion; here a license was requested—the Petitioners offered to pay statutory royalties —yet the request was refused.

It is also a fact, of which this Court may take note, that all song parodies—like all songs—that attain popular currency have some commercial aspect. Today, scores of companies, groups, and individuals write, perform, and record political parody songs of copyrighted material, relying on the fair use doctrine for their protection from claims of copyright infringement. *See* Petition at 20. Whenever the song gains more than a purely local audience, these parodies are presented in part for commercial purposes. They are played on commercial radio stations, broadcast on commercial television networks, performed at concerts for which admission is charged, or recorded on tapes or discs which are sold to the public. There is simply no other route into the popular culture than

through the marketplace; even were the parodists themselves to perform the work *gratis*, the act of transmitting this source of political discourse to the public is necessarily suffused with commercialism.

Yet the Sixth Circuit's opinion appears to say that anyone performing or recording song parodies for money must first seek permission. Such a result would destroy an art form which has existed longer than the nation.

Filed herewith as Exhibit 1 to Appendix C is a recent Capitol Steps recording, "From Yankee Doodle to Pander Bear," in which the group traces the art of song parody throughout American history.[6] As musically depicted in this Exhibit, song parodies have been a staple of American political life since the nation's beginnings, and have been used by union organizers, war resisters, war supporters, abolitionists, suffragettes, Whigs, Democrats, Republicans, and many others to express their views on the politics of the day. "Yankee Doodle," the "Star Spangled Banner," and "The Battle Hymn of the Republic" all began as song parodies—a placing of new and controversial words to a then popular song.

The political song is not merely a musical confection; it is, in the words of I.W.W. songwriter and activist Joe Hill, an unsurpassed instrument of political dialogue and organization:

> A pamphlet, no matter how good, is never read more than once, but a song is learned by heart and repeated over and over; and I maintain that if a person can put a few cold, common sense facts into a song and dress them up in a cloak of humor to take the dryness off them, he will succeed in reaching a great number of workers who are too unintelligent or too indifferent to read a pamphlet or an editorial on economic science.

Letter from Joe Hill to *Solidarity* (Dec. 12, 1914), *cited in* G. Smith, *Joe Hill* 19 (1969). Professor Smith noted that:

[6] Copies of this Exhibit have been lodged with the Court.

> Joe Hill, parodist and songsmith, was translator and scribe for the migrant workers and hobos of America, turning into lyrical expression their everday experience of disillusionment, hardship, bitterness, and injustice. His lyrics, for the most part, are tough, hard-bitten and scornful. . . . Hill wrote the music for his lyrics in only a few instances, usually setting his words to popular tunes of the time.

Id. at 15-16.[7]

At the other end of the political spectrum, the *Wall Street Journal* has called political song parody, "a time-honored tradition . . . Americans are the kind of people who appreciate this kind of thing." Wall Street Journal, Sept. 5, 1990 at A14, col. 3. The article discusses numerous song parodies related to the Gulf War (such as "Bomb, Bomb, Bomb . . . Bomb Bomb Iraq") which were recorded and played by disc jockeys on commercial radio stations.

In modern America, political song parodists continue to serve the same purpose historian Vera Brodsky Lawrence ascribed to them during the Civil War:

> People on both sides of the battle lines placed great reliance on the songs, finding in them a source of strength, courage. hope, much-needed laughter, and a general escape valve for the unbearable tensions of their lives. . . .

V. Lawrence, *Music for Patriots, Politicians, and Presidents* 341 (1975).

Denying parodists the protection of the fair use provision of the copyright law could force them either to cease doing what they do, or to continue performing and recording, while seeking the protection of the First Amendment. The former course would musically impoverish the nation; the latter would produce unnecessary constitu-

[7] Excerpts from Joe Hill songs are contained in "From Yankee Doodle to Pander Bear," the tape filed as Exhibit 1 to Appendix C.

tional litigation, the threat of which would no doubt deter many a would-be parodist.

2 Live Crew and the *amici* undoubtedly purvey strikingly different versions of satire and parody. But legal interpretations which may seem viable when aimed at unconventional or peripheral behavior must be evaluated in light of their potential impact on behavior which is at the heart of the zone of protected political discourse. However offensive the lyrics of "Pretty Woman" may strike some, it is not possible to subject them to censorship by copyright without imperiling a vibrant source of political speech which has flourished since the founding of the Republic.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for a Writ of Certiroari, this Court should grant the Petition, and reverse the judgment of the Court of Appeals in this matter.

Respectfully submitted,

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Dated: February 24, 1993

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Cincinnati, Ohio

Case No. 91-6225

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant
v.

LUTHER R. CAMPBELL, *et al.*,
Defendants-Appellees

On appeal from a decision of the United States
District Court for the Middle District of Tennessee

DECLARATION OF WILLIAM A. STRAUSS

1. My name is William A. Strauss. I am an officer and Director of Capitol Steps Productions, Inc., a Virginia corporation, and the paid, full time artistic director and co-lyricist for "The Capitol Steps," the company's musical and theatrical troupe. I have been with the troupe since its inception at a Christmas party in the U.S. Senate, and have been a director and officer of the corporation since its formation. I am also an attorney and a member of the Bar of the District of Columbia.

2. The Capitol Steps have been performing in the Washington, D.C. area and nationally for eleven years. The troupe regularly performs on national network radio and television, including on such shows as "All Things

Considered," "Nightline" and "Good Morning America," and at live shows around the country, including in the states of the Sixth Circuit. The Capitol Steps produce and sell recordings of their songs and live performances. The troupe has performed for, and at the invitation of President Reagan and President Bush (five times). We have also performed for Governor Clinton, Senator Gore, judicial conferences, and probably three quarters of all current Members of Congress.

3. A Capitol Steps performance consists primarily of song parodies, principally of copyrighted songs. The parodies, which generally have a high current political content, range in length from a few bars to an entire parody rendition. Recent examples are "I Wanna Be Your Pander Bear," and "I've Taken Stands on Both Sides Now," which are satirical jabs at Governor Clinton and President Bush, respectively. Song parodies are an integral part of musical political satire because they provide musical hooks, puns and other cultural reference points that add to the humor while making it easier for audiences to grasp (and remember) the political messages. Many educators have told us of the usefulness of our song parodies in high schools and college civics classes. Government officials have frequently brought visiting foreign officials to the group's shows as a jovial way of demonstrating the role of free speech in the American political process. Before the Soviet collapse, Capitol Steps songs were broadcast throughout the world on the Voice of America.

4. The Capitol Steps do not seek or obtain licenses from copyright owners for two reasons. First, we have been advised by counsel that our songs constitute a "fair use" of the copyrighted material we use, and for which we give full credit to the original authors and composers. Second, we have found that, in the business of social or political satire, obtaining permissions from song publishers is, for all practical purposes, impossible.

5. On one occasion, the producers of a network television show, against our advice, tried to get publisher permission to perform seven of our songs. After much time and discussion, permission was denied in six of the seven cases.

6. Asking permission for such uses is interpreted by music publishers as, in effect, seeking their endorsement of the political ideas contained in our lyrics. Many copyrights are controlled by large corporations, such as Sony or Walt Disney, which have ongoing issues and relationships in Washington. These companies have no interest in endorsing barbed political satire directed at Members of Congress, the President, or even the federal judiciary. Nor do we wish to submit our lyrics to them for censorship. If we do not seek or obtain permission, then the ideas and lyrics of our songs—good or bad—are solely ours. And no one has claimed to be injured in the process; in our entire history, no one has ever sued us for copyright infringement.

7. We have frequently been contacted by other political parodists around the country who have described how they do not seek and can not obtain permission from music publishers for the use of copyrighted works for the reasons set forth in paragraph 4 and 6 above.

8. In our experience, song parodies cause no real or discernible harm to song publishers. People who book Capitol Steps shows, sit in our audiences, or buy our albums and tapes are interested in political satire, not in listening to melodies. We have never heard of anyone booking our show, or buying our albums, in lieu of booking performances or buying albums of the performers whose songs we parody. Similarly, it is impossible for me to imagine someone who would be dissuaded from buying the original version of "Oh, Pretty Woman" because he already owned the 2 Live Crew parody of that song.

9. I have carefully read the opinion issued by the Sixth Circuit Court of Appeals in this action. Unless this opinion is reconsidered, I would be personally quite fearful of having The Capitol Steps perform at any location within the Sixth Circuit, or of permitting our albums and tapes to be sold in those states. I am also fearful of having the group appear on national television or radio shows which are broadcast within that Circuit. Even more fundamentally, I am fearful that this opinion, unless reconsidered, would energize those who for whatever reason—including distaste for controversial ideas and opinions—may wish to quash song parodies as a popular form of political expression.

10. The Capitol Steps only learned that the Sixth Circuit had reversed the District Court's decision in the 2 Live Crew case on Tuesday, September 15, 1992, when we were informed of this fact by our attorney. I also learned at that time that 2 Live Crew had filed a Petition for Rehearing. Since we did not know before that date that a decision had been rendered, it was impossible for us to file a timely brief in support of the Petition for Rehearing under the Circuit's Local Rules. I do not believe that our filing a brief at this time would prejudice any party.

I make the foregoing declaration under penalty of perjury this 21 day of September, 1992.

/s/ William A. Strauss
WILLIAM A. STRAUSS

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Cincinnati, Ohio

Case No. 91-6225

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant
v.

LUTHER R. CAMPBELL, *et al.*,
Defendants-Appellees

On appeal from a decision of the United States
District Court for the Middle District of Tennessee

DECLARATION OF ALISON K. RUSSELL

1. My name is Alison K. Russell. I am Vice President of MADAR, Inc., a Washington, D.C. corporation. I am also the paid, full-time business manager for the political satirist, Mark Russell. In addition, I am his wife, and in a unique position to comment on his career.

2. Mark Russell has been performing in the Washington, D.C. area and nationally for nearly 40 years. He regularly appears on national network radio and television. For the past 18 years, he has hosted his own "Mark Russell Comedy Specials" on public television. He has appeared on nearly every national news show. He is a regular contributor to "Good Morning America," and was a co-star of the NBC show "Real People."

3. Mark Russell also appears in concert around the country. In 1992 alone, he will perform nearly 130 shows in 30 states, including those of the Sixth Circuit. He has appeared before the American Bar Association, the National Association of Broadcasters, and the Federal Communications Commission. He has appeared before, and at the behest of nearly every President and Vice President since Lyndon Johnson. He has also appeared at events at the request of former Chief Justice Warren Burger, numerous members of Congress, presidential candidates, governors, and state representatives of both political parties.

4. Mark Russell traces his start in political satire to the suggestion of members of Congress and their staffs. In 1958, he was performing the works of others, including Tom Lehrer and Charlie Drew, in the Carroll Arms Hotel, in Washington. Since it was the closest bar to the Hill, it was where many congressmen and their staffs adjourned at the end of the day. It was here that he began singing and talking about the events in Congress. As he wrote in the introduction to his book *Presenting Mark Russell* (Everest House Publishers, 1981), "my act is basically the same as it has been since 1961; only the names, as they say, have been changed to protect the retired and deceased."

5. Along with spoken material, Mark Russell performs song parodies, to both copyrighted and original melodies. A current parody of a copyrighted work is "We're Just Wild About Harry" to the tune of "I'm Just Wild About Harry," which is a satirical look at how Governor Clinton and President Bush are invoking the name of Harry Truman. Another is "The Quest," a song about Ross Perot to the tune of "The Impossible Dream."

6. Mark Russell does not seek or obtain license from copyright owners for several reasons. First, he has been advised that his use of copyrighted songs constitutes "fair use" of the copyrighted materials. Second, the very na-

ture of social and political satire makes it impossible to obtain timely permission. When, for instance, it is announced that the Pentagon is spending $600 for the purchase of a screwdriver, it is not possible to wait more than the few hours necessary to write and memorize "Wrench for Sale," to the tune of "Love for Sale." When the video tape of the Rodney King beating became known, it was not possible to wait more than the few hours necessary to write and memorize "On the Streets of LA" to the tune of "On the Street Where You Live."

7. It is not possible to wait for permission because at 7 or 8 p.m. on a Friday evening there is no way to get in touch with someone who might be able to get in touch with someone from whom permission might be obtained; the story may not last more than one day—in which case the exercise of getting permission would be moot; and because audiences have come to expect comment in song on the topic of the day from Mark Russell. To wait for permission means to disappoint the audience—something a professional performer would try never to do.

8. Asking permission would also be interpreted by music publishers as a request for an endorsement of the political ideas contained within the lyrics. Since the political views contained within a song are Mark Russell's, no endorsement is needed or wanted. In his nearly 40-year career, Mark Russell has never been sued for copyright infringement; nor has anyone ever claimed to be injured by what he has said or sung.

9. I see no real or discernable harm to song publishers from my husband's performances. People who book Mark Russell, or purchase a ticket to one of his concerts, or tune into his television show, do so because they want to hear what he is saying or singing about the current political scene. They are less interested in the song he parodies; other than perhaps some may get the intended pun. Rather, they are interested in what he is saying with his lyrics. On the other hand, through the use of

older, non-standard songs, I believe Mark Russell may have helped reintroduce tunes such as "Put on Your Old Grey Bonnet," whose copyright dates back to 1909, when he parodied it with his "AARP Fight Song." And I believe that the parodies may remind the audience that they always liked the original, and perhaps cause them to purchase it.

10. I have carefully read the opinion issued by the Sixth Circuit Court of Appeals in this action. I am grateful that Mark Russell has no concerts scheduled within the Sixth Circuit's jurisdiction between now and the end of the year. I am concerned that this opinion compromises future scheduled appearances within the Sixth Circuit's jurisdiction. I am also concerned that this opinion may cause those colleges and organizations within the Sixth Circuit's jurisdiction who have booked Mark Russell to consider cancelling their contracts rather than take the chance of becoming embroiled in a legal controversy.

11. I only learned about the Sixth Circuit opinion in this case last week, through a conversation with Bill Strauss of The Capitol Steps; prior to that time, I did not even know that an appeal was pending. I also learned last week that 2 Live Crew had filed a Petition for Rehearing. Since neither Mark Russell nor I knew before last week that a decision had been rendered, it was impossible for him to file a timely brief in support of the Petition for Rehearing under the Circuit's Local Rules. I do not believe that his filing a brief at this time would prejudice any party.

I make the foregoing declaration under penalty of perjury, this 20 day of September, 1992.

/s/ Alison K. Russell
ALISON K. RUSSELL

APPENDIX C

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF WILLIAM A. STRAUSS

1. My name is William A. Strauss. I am an officer and director of Capital Steps Productions, Inc., and the full time artistic director and co-lyricist for "The Capitol Steps," the company's musical and theatrical troupe. On September 21, 1992, I executed a declaration which was attached as Appendix A to the *amicus* brief filed in this action by The Capitol Steps and Mark Russell before the Sixth Circuit Court of Appeals. On September 20, 1992, Allison K. Russell, Mark Russell's wife and business manager, executed a declaration which was filed as Appendix B to that brief. Copies of these declarations are attached as Appendices A and B, respectively, to the

amicus brief which Mark Russell and we are now filing with the Supreme Court in this matter.

2. I have also caused to be lodged with the Clerk of this Court, as Exhibit 1 to this declaration, a recording produced by The Capitol Steps entitled "From Yankee Doodle to Pander Bear: A History of American Musical Parody." The recording contains excerpts from 66 of our nation's most memorable and historically significant musical parodies. We produced the tape as a tribute to those who wrote and sang these songs, and as a teaching aid for teachers of American history in secondary schools and colleges. I personally researched, collated, and edited the sung and spoken material documented on this tape, and know it to be accurately based on reliable and verifiable historical sources. (I am familiar with such sources, having co-authored three books regarding American history, including *Generations: The History of America's Future*, William Morrow/Quill, 1991.)

I make the foregoing declaration under penalty of perjury, this 21st day of February, 1993.

/s/ William A. Strauss
WILLIAM A. STRAUSS

Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

APPENDIX

In The

Supreme Court of the United States

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 25, 1993
CERTIORARI GRANTED MARCH 29, 1993

TABLE OF CONTENTS

	Page
Appendix A — Docket Sheet	1a
Appendix B — Complaint Filed June 18, 1990 With Exhibits	15a
Appendix C — Motion to Dismiss	28a
Appendix D — Affidavit of Oscar Brand Sworn to July 31, 1990 With Exhibits	30a
Appendix E — Memorandum in Support of Motion to Dismiss	39a
Appendix F — Motion to Deposit Funds	81a
Appendix G — Affidavit of Luther Campbell Sworn to July 31, 1990 With Exhibits	83a
Appendix H — Affidavit of M. William Krasilovsky Sworn to July 31, 1990 with Exhibit	93a
Appendix I — Motion to Convert	99a
Appendix J — Order Allowing Deposit of Funds	103a
Appendix K — Response to Motion to Dismiss	105a
Appendix L — Declaration of Earl V. Spielman	138a
Appendix M — Declaration of Gerald E. Teifer	142a

Contents

Page

Appendix N — Defendants' Supplemental Memorandum in Support of Motion to Dismiss 145a

Appendix O — Motion to Compel Production of Documents 156a

Appendix O — Memorandum of Law in Support of Motion to Compel 183a

Appendix O — Defendants' Response to the Plaintiff's Motion to Compel Filed January 16, 1991 ..... 271a

Appendix P — Memorandum Opinion 274a

Appendix Q — Order Granting Partial Summary Judgment 295a

Appendix R — Motion for Entry of Supplemental Order 297a

Appendix S — Supplemental Order Certifying Interlocutory Appeal 302a

Appendix T — Order of the United States Court of Appeals for the Sixth Circuit Denying Interlocutory Appeal ... 304a

Appendix U — Motion for Distribution of Funds or Permission to File Additional Briefs Filed June 10, 1991 ..... 306a

Appendix V — Motion to Amend Complaint Filed June 10, 1991 ..... 310a

Contents

Page

Appendix W — Defendants' Response to Plaintiff's Motion for Distribution of Funds Dated June 21, 1991 ..... 316a

Appendix X — Order Denying Motion to Amend 320a

Appendix Y — Declaration of Jerry Flowers 321a

Appendix Z — Response to Supplemental Brief on Damages and New Evidence 328a

Appendix AA — Order Confirming Summary Judgment 335a

Appendix BB — Order to Distribute Funds 337a

Appendix CC — Notice of Appeal Filed October 15, 1991 ..... 339a

Appendix DD — Opinion of the United States Court of Appeals for the Sixth Circuit Filed August 17, 1992 ... 342a

Appendix EE — Order of the United States Court of Appeals for the Sixth Circuit Filed October 26, 1992 Denying Petition for Rehearing En Banc 376a

APPENDIX A — DOCKET SHEET

U.S. District Court
MIDDLE DISTRICT OF TENNESSEE (Nashville)

CIVIL DOCKET FOR CASE #: 90-CV-524
Filed: June 18, 1990

Acuff-Rose Music v. Campbell, et al
Assigned to: Judge Thomas A. Wiseman, Jr.
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Jury demand: Plaintiff
Nature of Suit: 820
Jurisdiction: Federal Question

Cause: 17:101 Copyright Infringement

ACUFF-ROSE MUSIC, INC. plaintiff	Alan L Marx [COR LD NTC] Francis J. Del Casino [COR LD NTC] Elizabeth B. Marney [COR LD NTC] E. Andrew Norwood [COR LD NTC] King & Ballow 200 Fourth Avenue, N. 1200 Noel Place Nashville, TN 37219 (615) 259-3456
v.	

Appendix A

LUTHER R. CAMPBELL aka Luke Skyywalker defendant	Alan Mark Turk [COR LD NTC] Sanford R. Ross [COR LD NTC] Health America Corporation 3310 West End Avenue 4th Floor Nashville, TN 37203 (615) 386-9991
CHRISTOPHER WONGWON aka Fresh Kid Ice defendant	Alan Mark Turk (See above) [COR LD NTC] Sanford R. Ross (See above) [COR LD NTC]
MARK ROSS aka Brother Marquis defendant	Alan Mark Turk (See above) [COR LD NTC] Sanford R. Ross (See above)
DAVID HOBBS aka Mr. Mixx defendant	Alan Mark Turk (See above) [COR LD NTC] Sanford R. Ross (See above) [COR LD NTC]
2 LIVE CREW defendant	Alan Mark Turk (See above) [COR LD NTC]

Appendix A

	Sanford R. Ross (See above) [COR LD NTC]
LUKE SKYYWALKER RECORDS defendant	Alan Mark Turk (See above) [COR LD NTC] Sanford R. Ross (See above) [COR LD NTC]

Date	No	Proceedings
6/18/90	1	COMPLAINT, w/ attached Exhibits A-E. (Summons(es) issued) Filing fee paid in the amount of : $120.00 Receipt # 28267. (ag) [Entry date 09/10/91]
7/23/90	2	STIPULATION by Judge Thomas A. Wiseman Jr. : It is agreed that the dfts shall have until close of business on 8/1/90 to file a responsive pleading to complaint. (EOD 7/24/90) (cc: all counsel) (1h) [Entry date 10/16/91]
8/1/90	3	MOTION by defendants to dismiss (1h) [Entry date 10/16/91]
8/1/90	4	AFFIDAVIT of Oscar Brand re [3-1] (1h) [Entry date 10/16/91]

Appendix A

Date	No	Proceedings
8/1/90	5	MEMORANDUM by defendants in support of motion to dismiss [3-1] (1h) [Entry date 10/16/91]
8/3/90	6	MOTION by defendants to deposit funds in amount of $13,867.56 w/att Order for same (lh) [Entry date 10/16/92]
8/3/90	7	AFFIDAVIT of Luther Campbell re [6-1] (1h) [Entry date 10/16/91]
8/3/90	8	AFFIDAVIT of M. William Krasilovsky re [6-1] (1h) [Entry date 10/16/91]
8/15/90	9	RESPONSE by plaintiff to motion to deposit funds [6-1] (1h) [Entry date 10/16/91]
8/15/90	10	MOTION by plaintiff to convert dft's mtn to dismiss to a mtn for summary judgment (1h) [Entry date 10/16/91]
8/24/90	11	ORDER by Judge Thomas A. Wiseman Jr. granting motion to deposit funds [6-1] Dfts deposit w/the court $13,867.56. Court will hold these funds during the pendency of this litigation or until such time as the court determines said funds should be

Appendix A

Date	No	Proceedings
		released. These funds will be automatically rolled over into an interest bearing account unless otherwise ordered by the court. Ordered that counsel has designated that these funds be deposited in an interest bearing checking account at First American National Bank, in the name of the Clerk. Ordered that the clerk deduct an amount equal to the income earned and credited to the investment account for the first 45 days of income earned and to deposit in the U.S. Treasury. (EOD 8/24/90) (cc: all counsel) (1h) [Entry date 10/16/91]
8/24/90	12	AGREED ORDER by Judge Thomas A. Wiseman Jr. Ordered that pltf's response to motion to dismiss [3-1] will be due 8/28/90 (EOD 8/27/90) (cc: all counsel) (1h) [Entry date 10/16/91]
8/28/90	13	RESPONSE by plaintiff to motion to dismiss [3-1] w/atts consisting of copy of Declaration of Gerald E. Teifer, Declaration of Earl V. Spielman, etc. (1h) [Entry date 10/16/91]

Appendix A

Date	No	Proceedings
8/28/90	14	DECLARATION of Earl V. Spielman, att to [13-1] (1h) [Entry date 10/16/91]
8/30/90	15	NOTICE by plaintiff of substitution of substitution of original declaration of Gerald E. Teifer (cpy of same att to resp, #13) (1h) [Entry date 10/16/91]
8/30/90	16	DECLARATION of Gerald E. Teifer re [13-1] (1h) [Entry date 10/16/91]
10/5/90	17	SUPPLEMENTAL MEMORANDUM by defendants in support of motion to dismiss [3-1] (1h) [Entry date 10/16/91]
10/26/90	18	SCHEDULING ORDER Judge Thomas A. Wiseman Jr., pretrial conference set for 1:00 8/9/91; jury trial set for 9:00 8/27/91 (EOD 10/26/90) (cc: all counsel) (1h) [Entry date 10/16/91]
10/26/90	19	ORDER by Judge Thomas A Wiseman Jr. This action is set for trial on Tuesday, 8/27/91, 9:00 a.m., Nashville. If action is to be settled, the Courtroom Deputy shall be notified by noon on Friday before the

Appendix A

Date	No	Proceedings
		date of trial. If settlement is reached thereafter resulting in the non-utilization of jurors, the costs of summoning jurors may be taxed to the ptys dependent upon the circumstances. The requirements set forth in this order shall also apply to any future continuances of the above trial date. (EOD 10/26/90) (cc: all counsel) (1h) [Entry date 10/16/91]
12/14/90	20	MOTION by plaintiff to compel production of documents (1h) [Entry date 10/16/91]
12/14/91	21	MEMORANDUM by plaintiff in support of motion to compel production of documents [20-1] (1h) [Entry date 10/16/91]
1/4/91	22	MOTION by defendants to extend time to respond to pltf's mtn to compel (1h) [Entry date 10/16/91]
1/4/91	23	AFFIDAVIT of Alan Mark Turk re [22-1] (1h) [Entry date 10/16/91]
1/10/91	24	ORDER by Judge A. Wiseman Jr. granting motion to extend [22-1] time to respond to mtn to compel to 1/18/91 (EOD 1/10/91) (cc: all counsel) (1h) [Entry date 10/16/91]

Appendix A

Date	No	Proceedings
1/11/91	25	MEMORANDUM OF THE COURT (EOD 1/14/91) (cc: all counsel) (1h) [Entry date 10/16/91]
1/11/91	26	ORDER by Judge Thomas A. Wiseman Jr. For the reasons stated in accompanying memo, granting motion to dismiss (summary judgment) [3-1] pursuant to Rule 56 of the FRCP. Dft's rendition of "Pretty Woman" is a parody of the original "Oh, Pretty Woman" that constitutes fair use. The two TN state law claims for interference w/business relations and interference w/prospective business advantage for the performance and distribution of a cpy of "Oh, Pretty Woman" are preempted. dismissing case (EOD 1/14/91) (cc: all counsel) (1h) [Entry date 10/16/91]
1/16/91	27	RESPONSE by defendants to motion to compel production of documents [20-1] (1h) [Entry date 10/16/91]
2/11/91	28	NOTICE OF APPEAL by plaintiff from Dist. Court decision [26-2] entered on 1/14/91 (1h) [Entry date 10/16/91]

Appendix A

Date	No	Proceedings
2/13/91	—	Short and Certified Record on Appeal sent to 6th CCA re [28-1] (1h) [Entry date 10/16/91]
2/13/91	29	MOTION by plaintiff for entry of supplemental order (1h) [Entry date 10/16/91]
2/14/91	30	SUPPLEMENTAL ORDER by Judge Thomas A. Wiseman Jr. granting motion for entry of supplemental order [29-1] The court hereby certifies that the Order of 1/14/91 should be appealable pursuant to 28:1292(b). This supplemental order is entered in supplementation and amendment of the order and memo entered on 1/14/91 (EOD 2/19/91) (cc: all counsel) (1h) [Entry date 10/16/91]
2/19/91	—	TRANSMITTED supplemental record on appeal to 6th CCA re [28-1] enclosing docs # 29 & 30 (1h) [Entry date 10/16/91]
2/19/91	31	MEMORANDUM by plaintiff in support of motion for entry of supplemental order [29-1] (1h) [Entry date 10/16/91]

Appendix A

Date	No	Proceedings
2/20/91	—	TRANSCRIPT Order Form for dates: trans unnecessary for appeal re [28-1] (1h) [Entry date 10/16/91]
3/4/91	—	NOTIFICATION by 6th CCA of Appellate Docket Number 91-5232 (1h) [Entry date 10/16/91]
4/3/91	—	INFORMATION COPY from 6th CCA dtd 4/1/91, action is dismissed for lack of jurisdiction. This dismissal will have no effect on plt's pending petition for permission to appeal pursuant to 28:1292(b) (1h) [Entry date 10/16/91]
4/8/91	32	ORDER from 6th CCA dtd 4/4/91, petition for leave to appeal is denied (1h) [Entry date 10/16/91]
5/14/91	33	MANDATE from 6th CCA dtd 4/25/91, dismissing the appeal [28-1] for lack of jurisdiction. This dismissal will have no effect on pltf's pending petition for permission to appeal pursuant to 28:1292(b) (1h) [Entry date 10/16/91]
5/14/91	—	RECORD on appeal returned from 6th CCA re appeal [0-0] (1h) [Entry date 10/16/91]

Appendix A

Date	No	Proceedings
6/10/91	34	MOTION by plaintiff for distribution of funds or permission to file additional brief (1h) [Entry date 10/16/91]
6/10/91	35	MOTION by plaintiff to amend complaint w/original of same att (1h) [Entry date 10/16/91]
6/10/91	36	MEMORANDUM by plaintiff in support of motion to amend complaint [35-1] (1h) [Entry date 10/16/91]
6/10/91	—	REMARK: Case inadvertently closed. Case reopened this date (1h) [Entry date 10/16/91]
6/19/91	37	RESPONSE by defendants to motion to amend complaint [35-1] (1h) [Entry date 10/16/91]
6/19/91	38	RESPONSE by defendant to motion for distribution of funds [34-1] (1h) [Entry date 10/16/91]
7/8/91	39	REPLY by plaintiff to response to motion to amend complaint [35-1] (1h) [Entry date 10/16/91]
7/24/91	40	SUPPLEMENTAL MEMORANDUM by defendants in opposition to motion to amend complaint [35-1] (1h) [Entry date 10/16/91]

Appendix A

Date	No	Proceedings
8/2/91	41	NOTICE of hearing; prtrial conf cancelled on 1:00 8/9/91; status conf set on 1:00 8/9/91 (1h) [Entry date 10/16/91]
8/7/91	42	NOTICE of offer of judgment by defendants (1h) [Entry date 10/16/91]
8/8/91	43	ORDER by Judge Thomas A. Wiseman Jr. denying motion to amend complaint [35-1] The amendment is untimely (EOD 8/9/91) (cc: all counsel) (1h) [Entry date 10/16/91]
9/9/91	44	"Supplemental" BRIEF FILED by plaintiff Acuff-Rose Music on damages and on new evidence as requested by the Court during the status conference held 8-9-91. (ag) [Entry date 10/16/91]
9/9/91	45	DECLARATION by Jerry Flowers in Support of Brief [44-1]. (ag) [Entry date 10/16/91]
9/20/91	46	RESPONSE by defendants to plaintiff's supplemental brief on damages and new evidence [44-1]. (ag)[Entry date 10/16/91]

Appendix A

Date	No	Proceedings
9/30/91	47	ORDER by Judge Thomas A. Wiseman Jr.: In accordance with the Court's 1-14-91 order finding that the defendants' musical parody is protected under the fair use doctrine, the Court hereby ORDERS that the sum total of the funds and interest deposited with the Court pursuant to FRCP 67 be returned to the defendants. This is a final order terminating case from which an appeal of right lies. It is so Ordered. (EOD 9-30-91) (cc: all counsel and Financial Deputy) (ag) [Entry date 10/16/91]
10/3/91	48	MOTION by defendants for the Court to amend its order entered 9-30-91 to reflect that the funds be payable to Alan Mark Turk. (ag)
10/8/91	49	ORDER by Judge Thomas A. Wiseman Jr. granting motion for the Court to amend its order entered 9-30-91 to reflect the funds be payable to Alan Mark Turk [48-1]. (EOD 10-9-91) (cc: all counsel and Financial Deputy) (ag) [Entry date 10/16/91]

Appendix A

Date	No	Proceedings
10/15/91	50	NOTICE OF APPEAL by plaintiff from Dist. Court decision [47-2] entered on 9/30/91 (1h) [Entry date 10/16/91]
10/15/91	—	RECEIVED filing fee (1h) [Entry date 10/16/91]
10/16/91	—	Short Record on Appeal sent to 6th CCA re [50-1] (1h)
10/16/91	—	REMARK: Service of NOA to Alan Mark Turk & Sanford R. Ross (1h)
10/28/91	—	NOTIFICATION by 6th CCA of Appellate Docket Number 91-6225
11/6/91	—	TRANSCRIPT Order Form for dates: trans unnecessary for appeal re [50-1] (1h)
11/6/91	—	Notice of Completion mailed to 6CCA (1h)

APPENDIX B — COMPLAINT FILED JUNE 18, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3 90 0524

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

JURY DEMAND
JUDGE WISEMAN

COMPLAINT

This is an action for copyright infringement and tortious interference with business relationships and prospective business advantage. In support of its complaint, Plaintiff states:

Appendix B

PARTIES

1. Plaintiff Acuff-Rose Music, Inc., is a Tennessee corporation. Plaintiff maintains offices and does business in the Middle District of Tennessee.

2. Defendants Luther Campbell, a/k/a Luke Skyywalker, Christopher Wongwon, a/k/a Fresh Kid Ice, Mark Ross, a/k/a Brother Marquis, and David Hobbs, a/k/a Mr. Mixx, on information and belief are residents of the State of Florida.

3. These individuals make up a "rap" music group known professionally as The 2 Live Crew. The group does business and may be found in the Middle District of Tennessee.

4. Defendant Skyywalker Records is a corporation organized under the laws of the State of Florida, with its principal place of business in Miami, Florida. Skyywalker Records does business and may be found in the Middle District of Tennessee.

JURISDICTION AND VENUE

5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1338, 1331, and 1332 and the doctrine of pendant jurisdiction.

6. Venue lies in this district pursuant to 28 U.S.C. § 1400(a).

FACTS

7. Roy Orbison and William Dees were the co-authors of an original musical work entitled "Oh, Pretty Woman."

8. The musical work "Oh, Pretty Woman" contains subject

Appendix B

matter copyrightable under the laws of the United States.

9. Roy Orbison and William Dees assigned their rights in "Oh, Pretty Woman" to Acuff-Rose Music, Inc. in 1964.

10. Acuff-Rose's predecessor registered "Oh, Pretty Woman" for copyright protection on August 26, 1964, under Copyright Registration No. EP-191739.

11. The copyright registration in "Oh, Pretty Woman" was acquired by Opryland USA Inc. in 1985.

12. Plaintiff has complied with all of the requirements of the copyright laws of the United States and now holds the copyright to "Oh, Pretty Woman."

13. "Oh, Pretty Woman" was a hit when it was first recorded and has remained a popular work. Plaintiff receives frequent requests to license "Oh, Pretty Woman," and the revenues from domestic and foreign licensing have been and continue to be substantial. Plaintiff has zealously protected the copyright in "Oh, Pretty Woman" and has only granted licenses that were consistent with good taste and that furthered the value of the copyright. License requests are evaluated for their consistency with Plaintiff's long range plans for exploitation of the copyrighted work. Requests for licenses that either are not consistent with good taste or would disparage the future value of the copyright are denied.

14. "Oh, Pretty Woman" has been frequently recorded and widely disseminated both by Plaintiff's predecessors in interest and by Plaintiff's licensees. Defendants had access to "Oh, Pretty Woman."

15. On July 5, 1989, Defendants wrote a letter to Plaintiff, requesting a license to create a derivative work from "Oh, Pretty Woman" for an upcoming album. The work was to be performed, manufactured, and distributed, both live and on commercially available record albums, tapes, and compact discs. On information and belief, various other uses were contemplated, including, but not limited to, distribution of the work as a single and as a music video.

16. On July 17, 1989, Plaintiff informed Defendants by letter that the license would not be granted. Exhibit A.

17. On or about July 15, 1989, Defendants released a record album entitled *As Nasty As They Wanna Be*. The album contained numerous sexually explicit lyrics.

18. Also on or about July 15, 1989, Defendants released a record album entitled *As Clean As They Wanna Be*. This album contains six of the 18 songs on *As Nasty As They Wanna Be*. In addition, *As Clean As They Wanna Be* contains four songs that did not appear on the *As Nasty As They Wanna Be* album.

19. One of the new songs on *As Clean As They Wanna Be* is a derivative work based on Plaintiff's copyrighted work "Oh, Pretty Woman."

20. Both the album cover and the label copy list the title of the song as "Pretty Woman" and state that it was "Written By: Roy Orbison and William Dees" and published by "Acuff-Rose (BMI)." A copy of the label information from the compact disc copy of *As Clean As The Wanna Be* is attached as Exhibit B.

21. The music used on the song "Pretty Woman" is substantially similar to "Oh, Pretty Woman" in melody. In

addition, the first verse of "Pretty Woman" is substantially similar to the first verse of "Oh, Pretty Woman." The unauthorized new lyrics created by Defendants for "Pretty Woman" are disparaging and therefore not consistent with maintaining the value of the copyright in "Oh, Pretty Woman." A transcription of the lyrics of "Pretty Woman" from *As Clean As They Wanna Be* is attached as Exhibit C. A copy of "Oh, Pretty Woman," as recorded by Roy Orbison, is attached as Exhibit D. A copy of "Pretty Woman," as it appears on the album *As Clean As They Wanna Be*, is attached as Exhibit E.

22. Plaintiff recently became aware of the Defendants' unauthorized use of "Oh, Pretty Woman."

23. On information and belief, Defendants are continuing to make use of "Oh, Pretty Woman," both in album and related sales and in live performances.

COUNT I

Copyright Infringement

24. Defendants have willfully infringed and commercially exploited Plaintiff's copyright in "Oh, Pretty Woman" by producing, manufacturing, distributing, and performing an unauthorized derivative work — their recording of "Pretty Woman" — that was copied from Plaintiff's copyrighted work, "Oh, Pretty Woman," and that was not licensed by Plaintiff.

COUNT II

Interference wjth Business Relationships

25. By their unlicensed copying and commercial

exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's business relationships with copyright licensees who have lawfully licensed the right to use "Oh, Pretty Woman."

COUNT III

Interference with Prospective Business Advantage

26. By their unlicensed copying and commercial exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's prospective business advantage in licensing future users of "Oh, Pretty Woman." In addition, Defendants have made disparaging unlicensed uses of "Oh, Pretty Woman." These uses have significantly lessened the value of licensing rights for "Oh, Pretty Woman," are not in good taste, and are detrimental to future attempts by Plaintiff to exploit the work by making it undesirable to future licensees.

RELIEF

WHEREFORE, Plaintiff prays that:

1. A date for a trial of the foregoing action be set.

2. Plaintiff be awarded either its actual damages plus Defendants' profits that resulted from their infringement of Plaintiff's copyright or the statutory damages for willful infringement, whichever is greater.

3. Plaintiff be awarded damages for Defendants' tortious interference with Plaintiff's business relationships and with Plaintiff's prospective business advantage.

4. Defendants forfeit all copies of *As Clean As They Wanna Be*, including all masters, tapes or other means by which *As Clean As They Wanna Be* can be reproduced.

5. Plaintiff be granted temporary and permanent injunctive relief.

6. Plaintiff be awarded its costs and reasonable attorneys' fees.

7. Plaintiff receive such other, further relief, both legal and equitable, as is just.

Respectfully submitted,

Of Counsel:

s/ Hal Willis / by EBM
Hal Willis

ACUFF-ROSE MUSIC, INC.

KING & BALLOW

By: s/ Elizabeth B. Marney
Alan L. Marx
E. Andrew Norwood
Elizabeth B. Marney
F. Casey Del Casino

1200 Noel Place
200 Fourth Ave. North
Nashville, TN 37219
(615) 259-3456

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Appendix B

EXHIBIT A — LETTER OF JULY 17, 1989

OPRYLAND MUSIC GROUP

ACUFF-ROSE MUSIC, INC.

MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,

s/ Gerry Teifer
Gerry Teifer

GT/jmm

Appendix B

EXHIBIT B — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging)

EXHIBIT C — TRANSCRIPTION OF LYRICS AS RECORDED BY 2 LIVE CREW

PRETTY WOMAN
(OH PRETTY WOMAN) AS RECORDED BY 2 LIVE CREW

PRETTY WOMAN WALKIN' DOWN THE STREET
PRETTY WOMAN GIRL YOU LOOK SO SWEET
PRETTY WOMAN YOU BRING ME DOWN TO THAT KNEE
PRETTY WOMAN YOU MAKE ME WANNA BEG PLEASE
OH, PRETTY WOMAN

BIG HAIRY WOMAN YOU NEED TO SHAVE THAT STUFF
BIG HAIRY WOMAN YOU KNOW I BET IT'S TOUGH
BIG HAIRY WOMAN ALL THAT HAIR IT AIN'T LEGIT
'CAUSE YOU LOOK LIKE 'COUSIN IT'
BIG HAIRY WOMAN

BALD HEADED WOMAN GIRL YOUR HAIR WON'T GROW
BALD HEADED WOMAN YOU GOT A TEENY WEENY AFRO
BALD HEADED WOMAN YOU KNOW YOUR HAIR COULD LOOK NICE
BALD HEADED WOMAN FIRST YOU GOT TO ROLL IT WITH RICE
BALD HEADED WOMAN HERE, LET ME GET THIS HUNK OF BIZ FOR YA
YA KNOW WHAT I'M SAYING YOU LOOK BETTER THAN RICE A RONI
OH BALD HEADED WOMAN

BIG HAIRY WOMAN COME ON IN
AND DON'T FORGET YOUR BALD HEADED FRIEND
HEY PRETTY WOMAN LET THE BOYS
JUMP IN

TWO TIMIN' WOMAN GIRL YOU KNOW YOU AIN'T RIGHT
TWO TIMIN' WOMAN YOU'S OUT WITH MY BOY LAST NIGHT
TWO TIMIN' WOMAN THAT TAKES A LOAD OFF MY MIND
TWO TIMIN' WOMAN NOW I KNOW THE BABY AIN'T MINE
OH, TWO TIMIN' WOMAN

OH PRETTY WOMAN

Appendix B

EXHIBIT D — AUDIO TAPE

(Omitted Here But Submitted Separately As Lodging)

Appendix B

EXHIBIT E — AUDIO TAPE

(Omitted Here But Submitted Separately As Lodging)

APPENDIX C — MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524
JUDGE WISEMAN

ORAL ARGUMENT REQUESTED

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION TO DISMISS

Come now the Defendants, by and through their attorneys, and move in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure for this Court to dismiss the Plaintiff's Complaint for failure to state a claim upon which relief can be granted. The Defendants rely on the Memorandum and Affidavits filed in

Appendix C

support of this Motion. The Defendants specifically request that the Court grant oral argument on this Motion.

Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. # 7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX D — AFFIDAVIT OF OSCAR BRAND SWORN TO JULY 31, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL, a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a

THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT OF OSCAR BRAND

STATE OF NEW YORK)

COUNTY OF NASSAU)

Comes now the Affiant and makes oath as follows:

1. I am Oscar Brand, a citizen and resident of Great Neck, New York. I am over the age of 18 years of age.

2. I am the Curator of the Songwriters Hall of Fame. I am the Editor of "Words About Music" for the National Academy of

Appendix D

Popular Music. I am the Host of "The Folksong Festival," a radio program which has broadcast since 1945 on New York's Public Radio Station WNYC. I am a composer and writer on subjects in the field of popular music.

3. I have been on the faculty of Hosftra University and the New School, lecturing on the subject of folk music, the musical theatre, and American history as revealed in the popular music of the day. I have written books, including *Songs of '76*, (Evans-Lippincott), *The Ballad Mongers*, (Funk and Wagnalls), *The Bawdy Song*, (Grove - Dorchester), *Singing Holidays*, (Knopf), *When I First Came To This Land*, (Dutton), and numerous folios and song collections. As the artist on 85 LPs, videotapes, CD's videotapes, and audiocassetts, I have recorded many parodies of popular songs in such albums as "Tell It To The Marines," "Every Inch A Sailor," "Pie In The Sky," "The Wild Blue Yonder," "Laughing America," "Campaign Songs of the U.S.," etc. As the author of books and folios on the subject of folk and popular music, I have studied the use of parody and satire in American culture. On my radio shows for CBS, NBC, and WNYC, I have often broadcast entire programs on the subject of parodies and satires on popular songs, including a July 29, 1990 airing. As a writer-composer of popular songs, I have often heard many of my own compositions, such as "A Guy Is A Guy," "When I First Came To This Land," "My Old Man's A Sailor," etc. used as parodies and satires.

5. I have been asked to examine the merits of this case, in which a parody of the Roy Orbison - William Dees song, "Oh, Pretty Woman," has been recorded with the title "Pretty Woman" by the group called 2 Live Crew. For the reasons cited above, I believe I can discuss this subject with complete expertise.

6. In my opinion, both the words and the music of the 2 Live Crew performance are classic parodies.

Appendix D

THE MUSIC

7. The Orbison recording of "Oh, Pretty Woman" begins with a 4/4 drum beat and a very recognizable "bass riff," (Numbers 1, 2, 3, 4). Attached as **Exhibit 1** to my Affidavit is the music chart of "Oh, Pretty Woman" in F. Major. The 2 Live Crew version begins with the same drum beat and the recognizable riff. The 2 Life Crew recording is essentially a musical joke, because the riff is followed by an atypical scraper — a Latin musical device, quite antithetic to the Orbison musical styling.

8. As in the Orbison recording, (6, 7, 8, 9, 10), the 2 Live Crew chorus sings the "Pretty Woman" chorus in the key of A major. But, the first soloist on the 2 Live Crew recording proceeds to sing in the key of B major, which, performed against the A major chorus, gives the song a comic aspect. Next, Orbison sings a refrain, (11, 12, 13, 14, 15). This refrain is ignored by 2 Live Crew, who repeat the "Pretty Woman" chorus. Then, in order to remind the listener that Orbison's song is the butt of the joke, the "bass riff" is repeated *eight times* by the 2 Live Crew musicians.

9. The second soloist for 2 Live Crew stays close to Orbison's original melody (19, 20, 21, 22, 23, 24), which makes the altered lyrics seem even more comic. However, once again, the 2 Live Crew soloist ignores the refrain, (25, 26, 27, 28, 29). He also ignores Orbison's following development (from 30 to 58), instead repeating the "Pretty Woman" chorus with comic words.

10. At the end of the 2 Live Crew recording, the bass riff is repeated, subtly changed by the dropping of one measure, another musical joke. Finally, the inappropriate scraper is again added to the riff to close the song.

11. *I*n sum, the music on 2 Live Crew's"Pretty Woman" uses

Appendix D

just enough material from the Orbison composition to create a very sophisticated comic parody of the original song.

THE LYRICS

12. The essence of parody is in its play on words. Altering the expected is the key to its humor. The revised form must stay close enough to the original to make comic the sudden twist — the substitution of new words for the familiar.

13. It is for that reason, that the popular song has throughout our history been the vehicle for satire and parody. As I pointed out in my book *Songs of '76*, our first parodies were based on old ballads and folk songs. The American Revolution was fought with re-writes as well as with guns. Nowadays, our popular music parodies are more likely to be comic variations of Beatles songs, Dylanesque laments, and, more recently, Rock and Roll "strike-offs" of such artists as Chuck Berry and Madonna.

14. On July 29, 1990, I broadcast one of many public radio programs on the subject of parody, using songs performed at the 90th Annual Legislative Correspondents' Association dinner in Albany, New York. Senator Al D'Amato sang a parody of the copyrighted song "It's A Sin To Tell A Lie."

> "Be sure, it's true when you write a headline.
> It's a sin to tell a lie.
> Many a pol has been broken,
> Because The New York Times has spoken."

Another parody featured on the show was a sci-fi version of the copyrighted song "Casey Jones," printed with many others in the *Canadian Folksong Bulletin*, (June - 1989):

> "Come all ye spacemen, if you want to hear,
> The story of a great planeteer.
> Spacey Jones was the pilot's name,
> On a fuel-burning rocket, boys, he won his fame."

Merle Travis' "16 Tons" was parodied as "The Schoolteacher's Lament," ending with the words, "I owe my soul to the P.T.A."

15. Parodies have never interfered with the popularity of the original. "The Star Spangled Banner" was altered a thousand times but persisted for over a century as written by Francis Scott Key. The sales graph of "Hello, Dolly" didn't change when it became "Hello, Lyndon," and "Hello, Nixon." Hundreds of popular songs have been "covered" by parody performances and recordings without altering their popular appeal or interfering with their sales. The original song is used because it *is* popular and is so recognizable as to make the alterations more humorous. This is especially true in the case of Afro-American music, of which "rap" is a prime example, being derived from the old "talking blues" form. In talking blues and rap music, parody is often used for protest and satire. New works are substituted which make fun of the "white-bread" originals an the establishment without, in any way, compromising the integrity of the original.

16. In the case of 2 Live Crew's "Pretty Woman" it seems obvious that this anti-establishment singing group is trying to show how bland and banal the Orbison song seems to them. It's just one of many examples of their derisive approach to "white-centered" popular music. They change the lyric "pretty woman" to "bald-headed woman," which is 100% pure parody.

17. Parody often changes the message of the original so that it becomes bawdy and sexist. The Orbison lyric invites the pretty

woman to "Come with me, baby, be mine tonight." The 2 Live Crew version makes the "pretty woman" into a "big hairy woman who ought to shave that stuff." And at the close of 2 Live Crew's version she turns out to be pregnant.

CONCLUSION

18. There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.

19. On the other hand, 2 Live Crew's versions, which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called "race" records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original.

20. To conclude, it is my belief that parodies such as 2 Live Crew's "Pretty Woman" are vital American artifacts. They should be encouraged and protected. The creative edge which has made American music the envy of the world would greatly suffer if such productions as 2 Live Crew's "Pretty Woman" were in any way curtailed.

s/ Oscar Brand
OSCAR BRAND

Sworn to and subscribed before me
this 31 day of July, 1990.

s/ Michael Drosihn
Notary Public

Appendix D

Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEYS FOR DEFENDANTS

Appendix D

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1st day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

Appendix D

EXHIBIT 1 — MUSIC CHART OF "OH, PRETTY WOMAN"

(Omitted Here But Submitted Separately As Lodging)

APPENDIX E — MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I

PREFACE

The Plaintiff has sued the Defendants for copyright infringement (Count I), interference with business relations (Count II), and interference with prospective business advantage

(Count III) for the performance and distribution of a parody of its original work, "Oh, Pretty Woman." The Plaintiff has admitted that the Defendants' version, "Pretty Woman," is a parody of the origina! work. (See Exhibit B to the Affidavit of Luther Campbell.) This is not a disputed fact. There are not material facts in dispute. The Defendants are entitled to a judgment on the pleadings, as a matter of law because the Defendants' parody of the original work constitutes "fair use" under 17 U.S.C. Section 107 of the Copyright Act and therefore does not constitute infringement. Further, Counts II and III of the Plaintiff's Complaint are clearly preempted by 17 U.S.C. Section 301 of the Copyright Act. Therefore, as a matter of law, the Plaintiff's Complaint fails to state a claim upon which relief can be granted and should be dismissed.

II

STATEMENT OF THE FACTS

Roy Orbison and William Dees were the co-authors of an original musical work entitled "Oh, Pretty Woman." In 1964, Roy Orbison and William Dees assigned their rights in "Oh, Pretty Woman" to the Plaintiff, Acuff-Rose Music, Inc. On August 26, 1964, the Plaintiff registered "Oh, Pretty Woman" for copyright protection under copyright registration number EP-191739. In 1985, the copyright registration in "Oh, Pretty Woman" was assigned to Opryland U.S.A., Inc.

On July 5, 1989, the Defendants, by and through their general manager, Linda Fine, wrote Gary [sic Gerry] Teifer of Opryland U.S.A., Inc. and Acuff-Rose Music Group, Inc., advising the Plaintiff of the intent of the Defendant group, The 2 Live Crew, to write and perform a parody of the song "Oh, Pretty Woman." (See Exhibit A to the Affidavit of Luther Campbell.) The Defendants, by and through Ms. Fine, advised the Plaintiff that the Defendants

intended to afford the Plaintiff, Mr. Dees, and Mr. Orbison all credits evidencing their ownership and authorship of the song "Oh, Pretty Woman" and that the Defendants intended to pay the statutory rate for the use of said song. (See Exhibit A to the Affidavit of Luther Campbell.) On July 17, 1989, Gerry Teifer of Opryland Music Group, Inc. and Acuff-Rose Music Group, Inc. responded in writing to Ms. Fine's correspondence and stated that "I must inform you that we cannot permit the use of parody of "Oh, Pretty Woman." (See Exhibit B to the Affidavit of Luther Campbell.)

Despite the refusal by the Plaintiff to permit the parody of "Oh, Pretty Woman," the Defendants included same in its musical compilation, released in 1989, entitled "As Clean They Want To Be." The Defendants, as promised, acknowledged the Plaintiff's ownership of the song and the authorship by Mr. Orbison and Mr. Dees. (See Exhibit C to the Affidavit of Luther Campbell.) The Defendants have moved, in accordance with Rule 67 of the Federal Rules of Civil Procedure, to deposit into Court as payment to the Plaintiff all monies due and owed for all sales of albums, cassettes, and compact discs at the statutory rate provided by law. (See Exhibit D to the Affidavit of Luther Campbell.)

III

STATEMENT OF THE LAW

1. THE DEFENDANTS ARE ENTITLED TO A JUDGMENT ON THE PLEADINGS.

The Defendants have moved in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure for the Court to dismiss the Plaintiff's cause of action for "failure to state a claim upon which relief can be granted." Rule 12(b) provides in part:

Appendix E

> . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56(c) of the Federal Rules of Civil Procedure provides in part:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Defendants have filed Affidavits with the Court of two expert witnesses: Oscar Brand and William Krasilovsky. The Defendants have also filed the Affidavit of the Defendant Campbell, the author of the parody. These Affidavits establish that the Defendants' parody of the Plaintiff's song, "Oh, Pretty Woman" constitutes "fair use" under 17 U.S.C. Section 107, of the Copyright Act. The Plaintiff, by and through its own agent, has admitted that the Defendants' version of "Oh, Pretty Woman," "Pretty Woman," is a parody. (See Exhibit B to the Affidavit of Luther Campbell.)

Appendix E

The Defendants concede that the Court in considering the Defendants' Motion must draw all reasonable inferences from the Plaintiff's Complaint. *Walker Process Equipment, Inc. v. Ford Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1965); *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 376 (1952). In short, on a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "the allegations of the complaint should be construed favorably to the pleader." *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974).

The Defendants respectfully assert that the despite this standard, the Plaintiff's Complaint fails to state a cause upon which relief may be granted. The Complaint filed June 18, 1990, alleges that Plaintiff "has zealously protected the copyright in 'Oh, Pretty Woman' and has only granted licenses that were consistent with good taste and that furthered the value of the copyright. License requests are evaluated for their consistency with Plaintiff's long range plans for exploitation of the copyrighted work. Requests for licenses that either are not consistent with good taste or would disparage the future value of the copyright are denied." (Complaint, paragraph 13.)

The Plaintiff attached as Exhibit C to the Complaint a transcription of the lyrics of "Pretty Woman" from *As Clean As They Want To Be*. The Plaintiff's allegation that these lyrics "are not consistent with good taste or would disparage the future value of the copyright" is unfounded.

The Complaint attaches as Exhibit A the letter from Gerry Teifer, the Plaintiff's agent, that acknowledges that the Defendants' version of "Oh, Pretty Woman," "Pretty Woman," is a parody. (Complaint, paragraphs 16) The Plaintiff admits that the Defendants did acknowledge their ownership interest on both the

cover and label copy of *As Clean As They Want To Be* and the authorship of Mr. Orbison and Mr. Dees. (Complaint, paragraph 20) The Complaint alleges that:

> The music used on the song "Pretty Woman" is substantially similar to "Oh, Pretty Woman" in melody. In addition, the first verse of "Pretty Woman" is substantially similar to the first verse of "Oh, Pretty Woman." The unauthorized new lyrics created by Defendants for "Pretty Woman" are disparaging and therefore not consistent with maintaining the value of the copyright in "Oh, Pretty Woman."
>
> . . .
>
> (Complaint, paragraph 21)

The Plaintiff's Complaint contains three separate counts. These counts are as follows:

COUNT I

Copyright Infringement

> 24. Defendants have willfully infringed and commercially exploited Plaintiff's copyright in "Oh, Pretty Woman" by producing, manufacturing, distributing, and performing an unauthorized derivative work — their recording of "Pretty Woman" — that was copied from Plaintiff's copyrighted work, "Oh, Pretty Woman," and that was not licensed by Plaintiff.

COUNT II

Interference with Business Relationships

> 25. By their unlicensed copying and commercial exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's business relationships with copyright licensees who have lawfully licensed the right to use "Oh, Pretty Woman."

COUNT III

Interference with Prospective Business Advantage

> 26. By their unlicensed copying and commercial exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's prospective business advantage in licensing future users of "Oh, Pretty Woman." In addition, Defendants have made disparaging unlicensed uses of "Oh, Pretty Woman." These uses have significantly lessened the value of licensing rights for "Oh, Pretty Woman," are not in good taste, and are detrimental to future attempts by Plaintiff to exploit the work by making it undesirable to future licensees.

(Complaint, paragraphs 24-26)

The Plaintiff failed to allege any other allegations in their

Complaint. The Complaint, as filed, should be dismissed because it fails to state a cause of action upon which relief can be granted as a matter of law. The Defendants version of "Oh, Pretty Woman," "Pretty Woman," does not constitute copyright infringement as alleged by the Plaintiff because said version constitutes fair use under 17 U.S.C. Section 107 of the Copyright Act. The Plaintiff's allegations that the Defendants interfered with their business relationships and interfered with their prospective business advantage are preempted by their claim under the Copyright Act, in that 17 U.S.C. Section 301, preempts these allegations by the Plaintiff. However, even if the Copyright Act is not the Plaintiff's exclusive remedy, *arguendo*, then the Plaintiff's Complaint still fails to state and/or even infer how the Defendants have interfered with the business relationship and/or prospective business advantage of the Plaintiff.

2. THE DEFENDANTS' VERSION OF "OH, PRETTY WOMAN" IS PROTECTED BY ARTICLE I, SECTION 8 OF THE UNITED STATES CONSTITUTION AND THE COPYRIGHT ACT OF 1976.

Article I, Section 8 of the United States Constitution empowers Congress to "promote the progress of science and the useful arts . . . by securing for limited times to authors . . . the exclusive right to their . . . writings." The Supreme Court has stated that "the economic philosophy behind the copyright clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The authors interest is subordinated to this end. *United States v. Paramont Pictures, Inc.*, 334 U.S. 131, 158 (1948).

A conflict exists between the public's constitutional right of

reasonable access to copyrighted materials and the copyright owner's statutory privilege under the copyright law. The Constitution grants copyright owners no rights. It merely authorizes Congress, under severe limitations, to enact copyright legislation. At most, the copyright owner has a statutory privilege, not a constitutional right. A long and uninterrupted line of cases hold unequivocally that, apart from common law protection for unpublished works, copyright protection is completely and solely a statutory matter and that copyright is only a privilege or a franchise. It is settled law that all copyright is simply a creature of statute, wholly a matter of congressional discretion to grant or to withhold. *Kraft v. Kahn*, 117 F.2d 579, 580 (2nd Cir. 1941); *Keene v. Wheatley*, 14 F.Cas. 180, 185 (No.7644)(C.C.E.D.Pa. 1861) as cited in *The Constitutional Dimension of "Fair Use" in Copyright Law*. 50 Notre Dame Lawyer 790, 791 and 792 (June, 1975).

The Supreme Court has consistently held that "the immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor but the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Fox Film Corp. v. Doval*, 286 U.S. 123, 127 (1932), as quoted in *Sony Corp. of America v. Universal Studios, Inc.*, 104 S.Ct. 774, 783 (1984). Thus, the American copyright system rests on the fundamental premise that vindication of the economic interest of the authors will ultimately maximize the information available to the public.

The Defendants have moved to deposit into Court. The statutory amount of money the Plaintiff is entitled to under the Copyright Act by virtue of the Defendants' use of its property. This payment by the Defendants satisfies their obligation to the Plaintiff under the Copyright Act.

Appendix E

3. THE DEFENDANTS' VERSION OF "OH, PRETTY WOMAN" CONSTITUTES FAIR USE UNDER 17 U.S.C. SECTION 107 OF THE COPYRIGHT ACT.

The Fair use doctrine was discussed at length in *Triangle Publications, Inc. v. Knight-Ridder NewsPapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980), wherein the United States Court of Appeals for the Fifth Circuit described the history of "fair use." The Court described fair use as "a 'rule of reason' fashioned by Judges to balance the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other." *Sobel, supra,* note 1, at 51 quoting Latman, Fair Use of Copyrighted Works 5 (Sen. Comm. On Judiciary Study No. 141960). "The fair use doctrine frequently serves to eliminate potential conflicts between copyright and free speech." See Denicola, Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 Calif.L.Rev. 283, 299, 303-04 (1979).

In *Meeropol v. Nizer,* 560 F.2d 1061, 1068 (2nd Cir. 1977), the United States Court of Appeals, Second Circuit, defined fair use as:

> A Privilege in others than the owner of the copyright to use the copyright material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright. The doctrine offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry. *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977).

Appendix E

In codifying the concept of fair use, Congress made clear that it in no way intended to depart from Court-created principles or to short-circuit further judicial development:

> The bill endorses the purpose and general cope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R.No. 94-1476, 94th Cong., 2d Sess. 66 (1976) (House Report), reprinted in [1976] U.S. Code Cong & Admin. News, pp. 5659, 5680 (referred to as USCCA). See also Ren.Rep.No.473, 94th Cong. 1st Sess. 62 (1975) (Senate Report).

The 1976 Copyright Act instructs Courts to consider four factors which had been previously judicially created. The statute indicates that these four factors are not necessarily exhaustive. 17 U.S.C. Section 107 provides in part:

> . . . In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a

commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

In *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980), the Court held that:

> The statute does not indicate how much weight is to be accorded each factor, but since the statutory formulation is simply a restatement of the case law, it is appropriate to look to the cases for guidance. Our research indicates that of these four factors, Courts have generally placed most emphasis on the fourth factor, the effect of the use upon the potential market for or the value of the copyrighted work. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130 (S.D.N.Y. 1968); 3 Nimmer on Copyright, section 13.05(b)(4), at 13-54 (1978) (indicating that the fourth factor is the most important and citing a host of cases).

In *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986), the United States Court of Appeals for the Ninth Circuit held that the

question whether or not a parody constituted "fair use" is a matter of law for the Court, not a question of fact for the jury. In *Fisher,* the composers of "When Sunny Gets Blue" brought copyright infringement action and unfair competition action against composer of "When Sonny Sniffs Glue" and others. The United States District Court for the Central District of California, William Duffy Keller, Judge, granted summary judgment in favor of defendants, and plaintiffs appealed. The Ninth Circuit Court of Appeals held that: (l) the parody was fair use of the original; (2) the parody was not immoral or obscene so as to deprive it of fair use protection; (3) the defendants did not engage in unfair competition; and (4) the parody could have no defamatory or disparaging meaning to those who heard it. The Ninth Circuit, in affirming the trial court's granting of summary judgment, held:

> We dispose of this last argument first, because it is completely undercut by the Supreme Court's recent decision in *Harper & Row Publishers, Inc. v. Nation Enterprises,* __ U.S __, 105 S.Ct. 2218, 85 L.Ed.2d 558 (1985). The Court held in that case that "[f]air use is a mixed question of law and fact", id. at 2331, and that "[w]here the District Court has found facts sufficient to evaluate each of the statutory factors," an appellate court may conclude as a matter of law-without remanding for further fact finding-" 'that [the challenged use] do[es] not qualify as a fair use of the copyright work,' " id. (quoting *Pacific & Southern Co. v. Duncan,* 744 F.2d 1490, 1495 n.8 (llth Cir. 1984), cert. denied, __ U.S. __, 105 S.Ct. 1867, 85 L.Ed.2d 161 (1985)).

> No material historical facts are at issue in this case. The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because, under *Harper & Row*, these judgments are legal in nature, we can make them without usurping the function of the jury.

Whether or not the Defendants' parody constitutes fair use under 17 U.S.C. Section 107 of the Copyright Act is a question of law for this Court to determine.

The Courts have adopted two models of the fair use doctrine. The first model is the economic model. The "economic" model of fair use posits that socially valuable use of an original should be limited only when the taking would result in significant commercial harm to the holder of the copyright. According to this model, the availability of the fair use defense should turn on two key determinations: (1) the social value of the challenged use, and (2) the use's tendency to substitute for the copyright holder's actual or potential commercial exploitation of the original. Under this analysis, a Court should find uses that are of even minimal social value to be fair if they do not substitute for exploitation of the original work. *The Parody Defense to Copyrighted Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1398 and 1399 (1984).

Because most Courts have accepted this utilitarian rationale for fair use, they have usually extended the defense to uses that appropriate originals yet are themselves creative — that is, "productive" uses. Whereas "reproductive" uses merely appropriate originals without adding a socially valuable creative element, the traditionally recognized types of productive use reportage, biography, criticism, and parody — build upon, and

perform functions different from, the originals they appropriate. *Elsmere Music Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2nd Cir. 1989). Because productive uses are presumed to be socially beneficial, Courts often pay little attention to the value of a use itself and instead focus on whether the use competes for the market of the original. *Meeropol v. Nizer*, 560 F.2d 1061 (2nd Cir. 1977). *The Parody Defense to Copyrighted Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1399 and 1400 (1984).

A second model has been judicially created, referred to as the reasonableness model. Perhaps because it seems intuitively unfair to allow others to appropriate substantially from an author's original work, many Courts have disallowed the extensive or verbatim takings even when the copyright holder has not shown a likely threat to the economic value of his copyright. Thus, productive use cases — particularly parody cases — have been influenced by this second model of fair use. According to this model, the amount of the original incorporated into the challenged use — a consideration codified in the Copyright Act as the "amount taken" factor — is the central criterion for determining whether the use is reasonable and they whether it is fair. Courts tend to find extensive takings unreasonable particularly when the contested use is parody, because the parodist has derisively turned the original author's work against him. Perhaps in reaction to the parodist's affront, Courts have come to focus their analysis in parody cases on the amount of the original taken by the parodist. *The Parody Defense to Copyrighted Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1400 (1984).

The preoccupation with the amount take, however, is inconsistent with the goal of American copyright protection: maximizing public access to information by providing economic

incentives for original creation. If a parody builds upon but does not commercially supplant an original, it produces a net increase in the amount of information available to society therefore, a purely economic analysis would require the protection of such a parody. *The Parody Defense to Copyriqhted Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev 1395, 1400 (1984).

The Defendants expert witness, Oscar Brand, has, in his Affidavit, compared the music and lyrics of the Plaintiff's "Oh, Pretty Woman" to the Defendants' parody, "Pretty Woman." (See Affidavit of Oscar Brand, paragraphs 7-17.) Mr. Brand states: "In sum, the music on 2 Live Crew's 'Pretty Woman' uses just enough material from the Orbison composition to create a very sophisticated comic parody of the original song." Mr. Brand further states: "The essence of parody is in its play on words. Altering the expected is the key to its humor. The revised form must stay close enough to the original to make comic the sudden twist — the substitution of new words for the familiar." (See Affidavit of Oscar Brand, paragraphs 11-12.)

The Defendants have alleged and the Plaintiff has admitted (see Exhibit B to the Affidavit of Luther Campbell) that the Defendants version of "Oh, Pretty Woman" is a parody. In *Cliffs Notes v. Bantam Doubleday Dell Pub. Group*, 886 F.2d 490, 493 (2nd Cir. 1989), the United States Court of Appeals, Second Circuit, held:

> We start with the proposition that parody is a form of artistic expression, protected by the First Amendment. For example, the Supreme Court has held that the First Amendment bars recovery "for the tort of intentional infliction of emotional distress by reason of" publication of satire "without showing in addition that the

> publication contains a false statement of fact which was made with 'actual malice.'" *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 882 99 L.Ed.2d 41 (1988). Similarly, our decisions have recognized "the broad scope permitted parody in First Amendment law." *Groucho Marx Prod., Inc. v. Day and Night Co.*, 689 F.2d 317, 319 n. 2 (2nd Cir. 1982); see *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2nd Cir. 1980) (per curiam) ("in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody. . ."). We have stated the "general proposition" that "parody and satire are deserving of substantial freedom — both as entertainment and as a form of social and literacy criticism." *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2nd Cir.) (emphasis in original), cert. denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964). See generally Note, Trademark Parody: A Fair Use and First Amendment Analysis, 72 Va.L.Rev. 1079 (1986).

In *Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986), the United States Court of Appeals for the Ninth Circuit argued that in determining whether or not the parodist exceeded the amount that could be taken from the original work depended upon the medium of the respective work. The Court acknowledged "When the medium involved is a comic book, a recognizable caricature is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied." The Court concluded that:

Appendix E

> Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for accuracy," provides some license for "closer" parody. *See id.* To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in his original expression." *Id.* We think the balance tips in the parodists' favor here. In view of the parody's medium, its purposes, and its brevity, it take no more from the original than is necessary to accomplish reasonably its parodic purpose.

794 F.2d at 439.

In applying the fair use doctrine to parody, the Court should modify the previously discussed models and apply a three part analysis. First, if the Plaintiff proves substantial similarity between use and original, the Defendants should have the burden of showing that their use is "productive" — that it falls into one of the recognized categories of productive fair use or that in some way it adds to and alters the function of the original work. Second, if the Defendants establish that their use is productive, the inquiry should shift to whether there is a substantial possibility that the use will compete significantly for the market of the original. If the Plaintiff cannot prove such a possibility, the Court should protect the use. Third, if there is a substantial possibility of substitution, the Court should weight the social value of the use against the countervailing economic disincentive to the author. *The Parody*

Appendix E

Defense to Copyright Infringement: Productive Fair Use After Betamax, 97 Harv.L.Rev. 1395, 1409 (1984).

This Court should apply this three-part approach to the case at bar. Because parody is one of the traditional categories of productive use, any parody, including the Defendants' parody of the Plaintiff's copyrighted work, should be presumed productive. The Court should thus require the Plaintiff to demonstrate potential or actual commercial substitution of the parody for the original. The Plaintiff has failed to allege or even infer how the Defendants' parody will substitute for the original "Oh, Pretty Woman."

The Defendants, by and through their expert witnesses, have presented testimony that the Plaintiff's original work, "Oh, Pretty Woman," will not be substituted by the Defendants' parody, "Pretty Woman." This testimony is corroborated by simple logic and observation. William Krasilovsky states "the widespread publicity and news coverage involving 2 Live Crew, as well as my personal observation from hearing the recording, lead me to the conclusion that the intended audience for the two songs is entirely different. In other words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version." (See Affidavit of William Krasilovsky, paragraph c.) This testimony is corroborated by the Affidavit of Oscar Brand, which concludes:

> 18. There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.
>
> 19. On the other hand, 2 Live Crew's versions, which is unquestionably a comic parody, is

> aimed at the large black populace which used to buy what was once called "race" records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original.

The Defendants respectfully assert that no matter which model this Court adopts, the Defendants' parody constitutes fair use under 17 U.S.C. Section 107.

4. THE DEFENDANTS' VERSION OF "OH, PRETTY WOMAN" IS A PARODY, FOR COMMERCIAL USE WHICH DOES NOT SUBSTANTIALLY COPY NOR COMPETE WITH THE PLAINTIFF'S VERSION.

Parody and burlesque, as used here, are interchangeable terms which refer to humorous works whose humor is derived from a mocking imitation of other, usually serious, works. Although parody and burlesque have different technical meanings, what is crucial to a legal analysis is a common characteristic; both, by definition, depend for their existence upon the opportunity to copy other works. It is this characteristic which creates a conflict with copyright protection. *Parody, Burlesque, and The Economic Rationale for Copyright,* 11 Connecticut Law Review 615, 616 (Summer 1979).

A literary critic would distinguish parody from burlesque, and both from their sibling, travesty. Travesty achieves its humor by putting characters from serious works in ridiculous situations and exploiting the incongruity of the juxtaposition. Burlesque is more sophisticated in that it at least imitates the style of the work

burlesqued for the purpose of poking fun by applying the style to some topical subject other than that of the original work. Parody, the highest of these arts, focuses on both style and subject matter of the work imitated, drawing humor and insight from subtle variations which expose weakness of the original. See D. MacDonald, parodies 557-53 (1960); Yankwich, *Parody and Burlesque in the Law of Copyright,* 33 Can B.Rev. 1139 (1955) Although these differences are significant to literary scholars, what is important for a legal analysis is that each kind of humorous imitation has artistic value and place in literary history. *Parody, Burlesque and The Economic Rationale for Copyright,* 11 Connecticut Law Review 615, 616, note 6, (Summer 1979).

A parody cannot succeed unless its audience perceives it relation to the work parodied. Whether parody is viewed as a form of criticism or a compliment to the work imitated, it is copying which makes parody a distinct art form. Because of this, a "parody" which does not imitate another work, or one which does so poorly, or one which copies a work unknown to its audience, offers little humor; it lacks a crucial element, a degree of similarity to the original which can be seen by the audience. *Parody, Burlesque, and The Economic Rationale for Copyright,* 11 Connecticut Law Review 615, 616 and 617 (Summer 1979).

Although the Courts have insisted that the application of the fair use doctrine as applied to the issue of parody must be considered on a case-by-case basis, a historical review of the application of the four factors of the statutory fair use doctrine in parody cases will assist the Court.

In *Benny v. Loew's, Inc.,* 239 F.2d 532 (9th Cir. 1956), affirmed by an equally divided Court Sub. Nom. *Columbia Broadcasting System v. Loew's. Inc.,* 356 U.S. 43 (1958), the

Courts held that the half-hour burlesque by Jack Benny of the movie "Gaslight," for television constituted a copyright infringement and granted an injunction. The central determination in reaching that decision was that the burlesque took substantially from the original. The Courts held that:

> Parodized or burlesqued taking is to be treated no differently from any other appropriation; that is, as in all other cases of alleged taking, the issue becomes first one of fact, i.e. what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists.

239 F.2d at 537.

Unfortunately, Mr. Justice Douglas, for unexplained reasons, disqualified himself in the Gaslight case which resulted in the United States Supreme Court failing to have a majority opinion because the remaining eight justices divided equally on the questions presented to the Court. The result was to leave standing the decision of the Ninth Circuit which was ambiguous and not well reasoned. It is apparent, from the opinions, that neither the trial court nor the Ninth Circuit were amused by Mr. Benny's attempted parody. The trial court and the Ninth Circuit simply concluded that the taking was far too substantial to constitute fair use.

In *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348, 350 (S.D.Cal. 1955), the same district judge who sat in the *Loew* (Benny) case, the Honorable James M. Carter, held that the telecast of the burlesque "From Here to Obscurity," performed by Sid Ceaser and Imogene Coca on the Show of Shows, did not

infringe the copyright of the producer in the picture "From Here to Eternity" nor did the telecast constitute an unfair competition as to such picture. Judge Carter, in *Columbia Pictures Corp.*, held:

> With some hesitation, but with the assurance that there is logic and fairness behind them, as well as general support in the law, we suggest these principles:
>
> (a) When the alleged infringing work is of the same character as the copyrighted work, vix., a serious work with a taking from another serious copyrighted work, then the line is drawn more strictly than when a farce or comedy or burlesque takes from a serious copyrighted work or vice versa.
>
> (b) In historical burlesque a part of the content is used to conjure up, at least the general image, of the original. Some limited taking should be permitted under the doctrine of fair use, in the case of burlesque, to bring about this recalling or conjuring up of the original.
>
> (c) Burlesque may ordinarily take the local,e the theme, the setting, situation and even bare basic plots without infringement, since such matters are ordinarily not protectable.
>
> (d) The doctrine of fair use permits burlesque to go somewhat farther so long as the taking is not substantial. It may take an incident of the copyrighted story, a developed character

(subject to the limited right of an author in certain situations, Loew's Incorporated v. Columbia Broadcasting System, Inc., [note 1]) a title (subject to right of protection under unfair competition, Loew's Incorporated v. Columbia Broadcasting System, Inc., [note 38]) some small part of the development of the story, possibly some small amount of the dialogue.

(e) When burlesque takes more than the matter ordinarily not protected, and referred to above, it runs a calculated risk, that on all the facts involved, a trier of fact may find the taking substantial.

(f) The defense, "I only burlesqued" the copyrighted material is not per se a defense. To hold otherwise would seriously jeopardize rights of property in copyrights and investments in such works, and would ultimately seriously damage the prices to be paid to authors for their literary works . . .

Judge Carter distinguished his holding in *Columbia Pictures Corp.* from his decision in *Loew's* as follows:

> Unlike Loew's, here there was a taking of only sufficient to cause the viewer to recall and conjure up the original. This is a necessary element of burlesque. As Dr. Baxter stated at the trial of *Loew's Incorporated v. Columbia Broadcasting System Inc.*, the defendant has taken a small part and then " '[taken] off into the blue.' "

137 F.Supp. at 351.

In *Bloom & Hamlin v. Nixon*, 129 F. 977, 978 (E.D.Pa. 1903), the Court held that the singing of the chorus of a copyright song, "Sammy," from the "Wizard of Oz" was not an infringement when sung by one mimicking the star of the show, Lotta Faust. The Court held that the chorus of the song was "a mere vehicle for carrying the imitation along" and did not constitute an infringement.

In *Berlin v. E.C. Publications. Inc.*, 329 F.2d 541, 545 (2nd Cir. 1964), the Plaintiffs alleged that "Mad Magazine" by compiling a "collection of parody lyrics to 57 old standards which reflect the idiotic world we live today," infringed upon the copyrights held by the original works. 329 F.2d at 543. The parody lyrics, so that they could be sung, were written in the same meter as the original lyrics, as illustrated by the parody of "A Pretty Girl Is Like a Melody" substituted by "Louella Schwartz Describes Her Malady." The Court of Appeals affirmed the dismissal by the trial court of the original song publisher's claims of infringement. The Second Circuit specifically held:

> We believe in any event that the parody lyrics involved in this appeal would be permissible under the most rigorous application of the "substantiality" requirement. The disparities in theme, content and style between the original lyrics and the alleged infringements could hardly be greater. In the vast majority of cases, the rhyme scheme of the parodies bears no relationship whatsoever to that of the originals.

Appendix E

While brief phrases of the original lyrics were occasionally injected into the parodies, this practice would seem necessary if the defendants' efforts were to "recall or conjure up" the originals; the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounts to a "substantial" taking, if that standard is not to be woodenly applied. Similarly, the fact that defendants' parodies were written in the same meter as plaintiffs' compositions would seem inevitable if the original was to be recognized, but such a justification is not even necessary; we doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter.

In short, we believe that whatever use was made of the plaintiffs' works in this case fell far short of the "substantial" takings which were involved in Benny, even if we were to find the rationale of that opinion persuasive. While the social interest in encouraging the broad-gauged burlesque of Mad Magazine is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here. Cf. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 47 L.Ed. 460 (1903). For, as a general proposition, we believe that parody and satire are deserving of substantial freedom — both as entertainment and as a form of social

Appendix E

and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels" or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.

329 F.2d at 545

In *Berlin, supra,* the Court emphasized the failure by the Plaintiffs to "indicate with any degree of particularity the manner in which [commercial] injury might have been inflicted" and found that this tended to weaken the Plaintiffs' claims. The Defendants direct the Court's attention to Counts II and III of Plaintiff's Complaint. The Plaintiff, in the case at bar, has also failed to state with any particularity how the Defendants' use has injured the Plaintiff.

In *Elsmere Music, Inc. v. National Broadcasting Co.,* 482 F.Supp. 741 (S.D.N.Y.), affirmed 623 F.2d 252 (2nd Cir. 1989), held that a skit on the television program "Saturday Night Live" which, the Court of Appeals described as "poked fun at New York City's public relation campaign and its theme song" did not constitute copyright infringement. The Plaintiffs had alleged that the parody "I Love Sodom" infringed on their copyright of the song "I Love New York." The District Court summarized the nature and

Appendix E

the thrust of the parody:

> The song "I Love Sodom," as well as the sketch of which it was a part, was clearly an attempt by the writers and cast of SNL to satirize the way in which New York City attempted to improve its somewhat tarnished image through the use of a slick advertising campaign.

482 F.Supp. at 745.

District Judge Goettel rejected the Plaintiff's argument that the song "I Love Sodom" and the sketch of which it was a part did not constitute a valid parody of the "I Love New York" advertising campaign. 482 F.Supp. at 745 Judge Goettel then said:

> Having found that SNL sketch and song validly parodied the plaintiff's jingle and the "I Love New York" advertising campaign in general, the Court next turns to the important question of whether such use has tended to interfere with the marketability of the copyrighted work. See *Meeropol v. Nizer, supra,* 560 F.2d at 1070; *Mura v. Columbia Broadcasting System Inc.*, 245 F. Supp. 587, 590 (S.D.N.Y. 1965). In this regard, it is clear to the Court that the defendant's playing of the song "I Love Sodom" has not so interfered. The song has not affected the value of the copyrighted work. Neither has it had — nor could it have — the "effect of fulfilling the demand for the original." *Berlin v. E.C. Publications, Inc., supra,* 329 F.2d at 545. Just as imitation may be

Appendix E

> the sincerest form of flattery, parody is an acknowledgment of the importance of the thing parodied. In short, the defendant's version of the jingle has not in the least competed with or detracted from plaintiff's work.

Elsmere Music v. National Broadcasting Co., supra, at 747.

The Second Circuit affirmed *per curiam* "on Judge Goettel's thorough opinion", 623 F.2d at 253; but notwithstanding that thoroughness, was moved to append a footnote which reads as follows:

> The District Court concluded, among other things, that the parody did not make more extensive use of appellant's song than was necessary to "conjure up" the original. 482 F.Supp. at 747. While we agree with this conclusion, we note that the concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348, 354 (S.C.Cal. 1955). A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody *builds upon the original,* using the original as a known element of modern culture *and contributing something new for humorous effect or commentary.* (emphasis added).

Appendix E

In *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), the United States Court of Appeals, Ninth Circuit, held that the defense of fair use could not be applied to the copying of the plaintiff's cartoon characters where the copying was virtually complete or almost verbatim. The Court held:

> . . . it is first important to recognize that given the widespread public recognition of the major characters involved here, such as Mickey Mouse and Donald Duck (see e.g., R. 191-193), in comparison with other characters very little would have been necessary to place Mickey Mouse and his image in the minds of the readers. Second, when the medium involved is a comic book, a recognizable caricature is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied. Also, significant is the fact that the essence of this parody did not focus on how the characters looked, but rather parodied their personalties, their wholesomeness and their innocence.

581 F.2d at 757-758.

The Court further held:

> The short answer to this assertion, which would also justify substantially verbatim copying, is that when persons are parodying a copyrighted work, the constraints of the existing precedent do not permit them to take

Appendix E

> as much of a component part as they need to make the "best parody." Instead, their desire to make the "best parody" is balanced against the rights of the copyright owner in his original expressions. That balance has been struck at giving the parodist what is necessary to conjure up the original, and in the absence of a special need for accuracy (compare *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (2d Cir. 1977), certiorari denied, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756), that standard was exceeded here. By copying the images in their entirety, defendants took more than was necessary to place firmly in the reader's mind the parodied work and these specific attributes that are to be satirized. See Netterville, *Parody, Mimicry and Humorous Commentary*, 35 So.Cal.L.Rev. 225, 238 (1962).

In *MCA, Inc. v. Wilson*, 677 S.2d 180 (2nd Cir. 1981), the United States Court of Appeals, Second Circuit, held that the use of the song "Cunnilingus Champion of Company C" was not fair use under the copyright law of the song "Boogie Woogie Bugle Boy of Company B" where songs were competitors in the entertainment field, and that the infringing song was neither a parody nor burlesque of the original work. The Court specifically held:

> In reaching this conclusion, we have not overlooked the district court's finding that the amount copied form plaintiff's song was so substantial as to be unfairly excessive. Although we might have reached a different conclusion on the same facts, the district court's finding was not clearly erroneous and

> furnishes further support for its holding of infringement. *Rosemont Enterprises, Inc. v. Random House, Inc., supra,* 366 F.2d at 310; *Walt Disney Productions v. Mature Pictures Corp., supra,* 389 F. Supp. at 1398.

677 F.2d at 185.

In both the *Disney* decision and *MCA* decision, the Court found that the Defendants infringed because they substantially copied the original works. In the case at bar, as stated in the Affidavit of the Defendant Campbell, the Defendants' version of "Oh, Pretty Woman," "Pretty Woman," the Defendants only borrows from the original work that amount necessary to conjure up the image of the original work in the mind of the listener. The Defendants have submitted the Affidavits of expert witnesses which support this conclusion.

Disney did not sue the Air Pirates or Mature Pictures to retrieve valuable rights to its works so it could peddle them elsewhere. There has been no licensed parody of the Disney cartoon world or licensed use of the Mickey Mouse song in an obscene movie. On the contrary, the relief desired and obtained by Disney was to bar such uses of its copyrighted material, because they were thought degrading to the ideals represented by the materials. The bout with the "Cunnilingus Champion" was similarly motivated and there are elements of a motive to protect personal sensitivities in the attack by Irvin Berlin on Mad Magazine.

In *Pilsbury Co. v. Milky Way Productions, Inc.*, 215 USPQ 124, 131 (D.C.N.Ga. 1981), the District Court held that Screw magazine's use of the Pilsbury Company's trademark, the Popin' Fresh Doughboy, constituted fair use. The Court held that:

> Although the portrayal is offensive to the court, the court has not doubt that Milky Way intended to make an editorial comment on the values epitomized by these trade characters. The fact that Screw magazine is offered for sale does not compel a contrary conclusion. Social commentary placed in a newspaper or magazine is not put to a commercial use simply because the publication is sold rather than given to the public. The presentation was located on the inside of the magazine, not on the cover where it might be taken more reasonably as an attempt to capitalize on the plaintiff's original work.
>
> The plaintiff suggests that, in addressing this factor, the court should consider the generally salacious content of Screw magazine. The plaintiff seems to believe that a pornographic adaptation of copyrighted works should be accorded less protection under the fair use doctrine than what might otherwise be granted a more continent presentation. The Copyright Act, however, does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection. The character of the unauthorized use is relevant, but, in the court's judgment, the fact that this use is pornographic in nature does not militate against a finding of fair use.

Appendix E

In *University of Notre Dame v. Twentieth Century-Fox*, 256 N.Y.S.2d 301, 307 (1965), the Supreme Court of New York held:

> "What seems to one to be trash may have for others fleeting or even enduring values" (Hannegan v. Esquire, Inc., 327 U.S. 146, 158, 66 S.Ct. 456, 462, 90 L.Ed. 586). "everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine" (Winters v. People of State of New York, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840). Accordingly, as intimated at the outset, we may not import the role of literary or dramatic critic into our functioning as judges in this case; and so for purposes of the law we may not reach a conclusion that the works of fiction involve in this litigation are not artistic or literary works. Whether they are creations of merit, whether they have value only as entertainment and no value whatever as opinion, information or education, pose questions which would require us to stake out those elusive lines that we have been warned not to attempt in the cases above cited (see also Molony v. Boy Comics Publishers, 227 App.Div. 116, 171, 98 N.Y.S.2d 119, 123, Van Voorhis, J.). Whether "John Goldfarb, Please Come Home" is a good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it

Appendix E

> pains or pleases. It is enough that the work is a form of express "deserving of substantial freedom — both as entertainment and as a form of social and literary criticism" (Berlin v. E.C. Publications, Inc., 2 Cir., 329 F.2d 541, 545, cert. den., 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33); and we are not prepared to hold that exercise of the freedom in the instant circumstances infringes on rights which equity should protect.

In *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986), the Ninth Circuit discussed the fact that very often a parody was critical of the original work. The Court specifically held:

> In assessing the economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." B. Kaplan, *An Unhurried View of Copyright* 69 (1967). Copyright law is not designed to stifle critics. "'Destructive' parodies play an important role in social and literacy criticism and thus merit protection even though they may discourage or discredit an original author." *Parody Defense*, 96 Harv.L.Rev. at 1411. Accordingly, the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original — any bad review can have that effect — but rather whether it fulfills the demand for the original.

> Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable. *See, e.g., Air Pirates,* 581 F.2d at 756; *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied,* 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964); *Parody Defense, supra,* at 1409-11.

The "Gaslight" and "From Here to Eternity" cases come the closest to economic motivation on the part of the plaintiff, but even these economic motivations were qualitatively different from those which justify copyright protection. Those cases were elements of a larger competitive struggle between the motion picture industry and the burgeoning new threat to that industry, television. It has been suggested that the Courts, confronted with the tension between the movies and the new entertainment medium, might have played "Robin Hood" to the motion picture interests, that they "might [have] consciously or unconsciously weight[ed] the decisional scale to force bargaining between motion picture companies and television producers with regard to 'salable' aspects of motion pictures.

The Defendants respectfully assert, as supported by the Affidavits of their expert witnesses filed with the Court, that the parody and the copyrighted work do not compete. Although the Defendants' version is for commercial gain, the sale of the Defendants' version will not, in any way, reduce the economic value of the Plaintiff's work. (See Affidavits of William Krasilovsky and Oscar Brand.) In *Hill v. Whalen*, 220 F. 359, 360 (S.D New York 1914), the Court held that:

> One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much has been reproduced as will materially reduce the demand for the original. If it has, the rights of the owner of the copyright have been injuriously affected. A word of explanation will be here necessary. The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2nd Cir. 1966), the Court held:

> Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market, i.e., the average citizen rather than the college professor, has no bearing on whether a public benefit may be derived from such a work. Moreover, the district court in emphasizing the commercial aspects of the Hughes biography failed to recognize that "[a]ll publications presumably are operated for profit * * *." *Koussevitzky v. Allen-Towne & Health,* 188 Misc. 479, 483, 68 N.Y.S.2d 779, 783, aff'd,

272 App.Div. 759, 69 N.Y.S.2d 432 (lst Dept. 1947), and that "both commercial and artistic elements are involved in almost every [work] * * * " Note, 56 Column.L.Rev. supra at 597. Thus, we conclude that whether an author or publisher has a commercial motive or writes in a popular styled is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use. *Cf. Koussevitzky v. Allen. Towne & Health*, 68 N.Y.S.2d supra, 782-784 (construing N.Y. Civil Rights Law, McKinney's Consol. Laws, c. 6, section 51).

The question of whether or not the Defendants' version of "Oh, Pretty Woman," "Pretty Woman," constitutes "fair use" under 17 U.S.C. Section 107 is a question for the Court. *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986). A review of the four factors articulated by Congress, previously judicially determined, results in a finding that as a matter of law the Defendants did not infringe upon the Plaintiff's copyright because of the doctrine of fair use.

5. AS A MATTER OF LAW THE PLAINTIFF'S ALLEGATIONS OF INTERFERENCE WITH BUSINESS RELATIONSHIPS AND INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE MUST BE DISMISSED.

The Plaintiff has alleged in Count II and Count III of its Complaint that the Defendants' parody constitutes an interference with business relations and interference with prospective business advantage of the Plaintiff. It is assumed that these allegations are

based upon Tennessee state law. 17 U.S.C. Section 301 clearly preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter as specified by Sections 102 and 103 . . ."

Plaintiff's composition obviously comes within the scope of copyrightable works of authorship and is fixed in a tangible medium of expression. The test of whether the rights claimed are preempted is "if under state law the act of reproduction, performance, distribution or display will in itself infringe the state created right, then such right is preempted." *Nimmer On Copyright*, Section 1.01[b]. The Defendants respectfully assert that Counts II and III allege nothing more than "unlicensed copying and commercial exploitation" of its version of "Oh, Pretty Woman." The Plaintiff fails to even suggest how the Defendants' parody will interfere with its original work.

In *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986), the Ninth Circuit discussed the preemption by federal law. The Court held:

> Assuming arguendo that the false claiming of authorship constitutes a separate tort under California law, such a cause of action is nevertheless preempted by federal law. In *Compco Corp. v. Day- Bright Lighting, Inc.*, 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964), and *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964), the Supreme Court determined that the Supremacy Clause of the United States Constitution, U.S. Const., art. Vi, precludes the states from protecting types of intellectual

property that are already covered by the federal copyright or patent laws. *Sears* and *Compco* "ma[k]e it very clear that just as a state could not encroach upon the federal patent laws directly it could not do so indirectly under the guise of enforcing its laws against unfair competition where those laws would clash with the federal objectives." *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 717 (9th Cir. 1970), *cert. denied*, 402 U.S. 906, 91 S. Ct. 1376, 28 L.Ed.2d 646 (1971). The same applies to the copyright statute. Accordingly, the kind of misappropriation alleged by the composers can be redressed, if at all, only under federal law.

The allegations contained in Counts II and III of the Plaintiff's Complaint are precisely the acts protected by the Copyright Act. Therefore, Counts II and III of the Plaintiff's Complaint fail to state a cause of action upon which relief can be granted because such state remedies are not available because they are preempted by the Copyright Act.

IV

CONCLUS ION

The Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be granted because, as of a matter of law, the Defendants parody version of "Oh, Pretty Woman" constitutes fair use in accordance with 17 U.S.C. Section 107. Further, Counts II and III of the Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be

granted because the Plaintiff's exclusive remedy is under the Copyright Act, 17 U.S.C. Section 101 et seq., which preempts all equivalent state legal and equitable remedies.

Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEY FOR DEFENDANTS

Appendix E

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX F — MOTION TO DEPOSIT FUNDS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524

JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION TO DEPOSIT FUNDS

Come now the Defendants, by and through their attorneys, and, in accordance with Rule 67 of the Federal Rules of Civil Procedure and Local Rule 13 of the United States District Court for the Middle District of Tennessee, move to deposit with the Court a check made payable to the United States District Court for

Appendix F

the Middle District of Tennessee in the amount of $13,867.56. The Defendants would state that this payment constitutes all monies owed by the Defendants to the Plaintiff in the above-captioned case in accordance with the statutory rate established by the Copyright Act, 17 U.S.C. Section 101, et seq. The Defendants rely upon the Affidavit of Luther Campbell filed with the Court to establish the amount owed by the Defendants to the Plaintiff. The Defendants have contemporaneously filed with the Court, as required by Rule 67 of the Federal Rules of Civil Procedure and Local Rule 13, an Order permitting the deposit of these funds with the Court.

Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX G — AFFIDAVIT OF LUTHER CAMPBELL SWORN TO JULY 31, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF DADE)

PART I

COMES NOW the Affiant and makes oath as follows:

Appendix G

1. My name is Luther Campbell, and I am a citizen and resident of the State of Florida. I am over the age of eighteen (18) years of age.

2. In May, 1989, I wrote a parody of the song "Oh Pretty Woman" which I entitled "Pretty Woman". In writing the parody I felt it was necessary for the listener to identify the parody version with the original version written and performed by the late Roy Orbison. In writing the lyrics to the parody and selecting the accompanying *score* it was a critical factor that I determine what amount of the original work would be included in the parody. I chose to include the distinctive introduction of the original version of "Oh Pretty Woman" and the first line of lyrics because I felt this was sufficent for the listeners to identify the parody with the original work.

3. The parody "Pretty Woman" was an attempt on my part, through comical lyrics, to satirize the original work "Oh Pretty Woman", written and performed by Mr. Orbison.

PART II

1. On July 5, 1989, Linda Fine, General Manager of Luke Records f/k/a Luke Skyywalker Records, wrote Gerry [Gary] Teifer of Opryland U.S.A., Inc., and Acuff-Rose Music, Inc. Attached as Exhibit A to my Affidavit is a copy of that correspondence. The purpose of Ms. Fine's letter was to advise Acuff-Rose Music, Inc. of the intent of The 2 Live Crew to write and perform a parody of the song "Oh Pretty Woman" originally written and performed by Roy Orbison, for which Acuff-Rose Music, Inc. held the copyright. Ms. Fine enclosed with her correspondence "a copy of the lyrics, so that you may see their satirical parody, very similar in vein to what Wierd Al Yankovic

Appendix G

and other satirical artists are doing". (Exhibit A) Ms. Fine indicated that Acuff-Rose Music, Inc. would be acknowledged as the owner of the song and that the Defendants would pay the statutory rate for its use. Ms. Fine also indicated that the parody would be included on a novelty record and that it would by "heard by hundreds of thousands of new listeners in their homes". (Exhibit A)

2. On July 17, 1989, Gerry Teifer, of the Opryland Music Group, Inc. and Acuff-Rose, Music, Inc., wrote Linda Fine, General Manager of Luke Records, formerly known as Luke Skyywalker Records. Attached as Exhibit B is a copy of that correspondence. Mr. Teifer, as agent for the Plaintiff, indicated that "I must inform you that we cannot permit the use of a parody of "Oh Pretty Woman". (Exhibit B)

4. In June, 1989, Luke Records, formerly known as Skyywalker Records, released "As Clean As They Want to Be" which included "Pretty Woman" the parody of "Oh Pretty Woman" referenced in Ms. Fine's correspondence attached hereto as Exhibit A.

5. The Defendants did acknowledge Acuff-Rose Music, Inc.'s ownership interest in the song and the authorship of Mr. Orbison and Mr. Dees. Attached as Exhibit C is a photocopy of the compact disc cover which acknowledges these rights of the Plaintiff. "As Clean As They Want To Be" had moderate success in the market place, with combined sales of 248,000 units of albums, cassettes and compact discs. The Plaintiff, as the copyright owner of "Oh Pretty Woman" is entitled to be compensated the statutory rate for the combined sales of albums, cassettes and compact discs. An accounting has been performed by Luke Records, formerly known as Luke Skyywalker Records, to determine the amount of money owed to the Plaintiff. This amount is $13,867.56. Attached

Appendix G

as Exhibit D to my affidavit is a photocopy of a check made payable to the Plaintiff in the amount of $13,867.56 to compensate the Plaintiff for the combined sales of "As Clean As They Want To Be" for the inclusion of the parody "Pretty Woman". This check has been tendered to the Plaintiff through the United States District Court for the Middle District of Tennessee as was originally offered in Ms. Fine's correspondence dated July 5, 1989 (Exhibit A).

6. That all correspondence referenced above was sent to my legal counsel, Allen L. Jacobi who advised me that since the song was a parody that it could be released if so desired.

Further the Affiant sayeth not.

s/ Luther Campbell
LUTHER CAMPBELL

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 31 DAY OF JULY, 1990.

s/ Melanie I. Kerr
NOTARY PUBLIC, State of Florida

Appendix G

EXHIBIT A — LETTER OF JULY 5, 1989

July 5, 1989

Gary Teifer
Opryland, USA
P.O. Box 121900
Nashville, TN 37312-1900

RE: "Pretty Woman"

Dear Mr. Teifer:

As the General Manager of Skyywalker Records, I would like to inform you of "Two Live Crew's" desire to do a parody on the above captioned song.

In the event you have not hear of this group, they are one of the most successful rap groups in the country today. This LP will be their third release and the previous two have gone Gold and are close to Platinum.

At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain to what Weird Al Yankovic and other satirical artists are doing.

We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a

novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Sincerely,

Linda Fine
General Manager

Encl.
(cassette/lyric sheet)

EXHIBIT B — LETTER OF JULY 17, 1989

OPRYLAND MUSIC GROUP

ACUFF-ROSE MUSIC, INC.

MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,

s/ Gerry Teifer
Gerry Teifer

GT/jmm

Appendix G

EXHIBIT C — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging)

Appendix G

EXHIBIT D— PHOTOCOPY OF CHECK

(Omitted Here But Submitted Separately As Lodging)

Appendix G

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX H — AFFIDAVIT OF M. WILLIAM KRASILOVSKY SWORN TO JULY 31, 1990 WITH EXHIBIT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

Acuff-Rose Music Inc.

Plaintiff

vs.

Luther R. Cambell a/k/a Luke Skywalker, Christopher Wongwon a/k/a Fresh Kid Ice, Mark Ross a/k/a Brother Marquis, David Hobbs a/k/a Mr. Mixx

p/k/a The 2 Live Crew

and Luke Skywalker Records

Defendants

AFFIDAVIT

M. William Krasilovsky, an attorney at law, duly admitted to practice in the states of New York and Alaska and in federal courts affirms upon penalty of perjury as follows:

1. I am an attorney specializing in the field of entertainment law with a particular emphasis upon music copyright. I have been in this field since 1953 and attach hereto as Exhibit "A" my resume.

2. As co-author of the text "This Business of Music" published by the leading trade paper of the music industry, *Billboard*, I have stated the following concerning what is considered to be an "answer song" in the industry and its relationship to the doctrine of "fair use:" (pages 142-145)

> "The music industry has for many years contained "answer songs," which have been common in the country and western and rhythym and blues fields — areas that are now part of the pop music business. An original song might have been entitled, for example, "We always Walk in the Rain." If this should achieve success, another writer might shortly thereafter pen a song called, "We Never Walk in the Rain," as a humorous reply to an aftermath of the former song."

In addition, regarding fair use and parody (page 144):

> "Parody and burlesque of a copyrighted work are dependent on fair use and require caution. Mad Magazine was upheld by a Federal Circuit Court of Appeals in its defense of parodies, such as "The Last Time I Saw Paris," on the ground of fair use for humorous critical purposes. The court's decision pointed out that the copying did not exceed the amount required to recall reasonably and evoke in the reader the original version being parodied. . . ."

Page 143 of "This Business of Music" discusses the precedent of "Jesus Christ Superstar." Applying the factors therein designated, I note most emphatically that 2 Live Crew's work in the instant action cannot be considered a substitute for Plaintiff's work and is not in competition with Plaintiff's work.

3. I have been furnished with authentic copies of the two songs in question in the instant action, namely, "Oh Pretty Woman," as

recorded by Roy Orbison, and "Pretty Woman" as recorded by 2 Live Crew and have made the following observations:

a. The recent recording of 2 Live Crew utilizes an accompaniment throughout and in introductory melodic and lyric segment, which is designed to and accomplishes, an evocation of "Pretty Woman" as recorded by Roy Orbison.

b. It proceeds to parody and satirize the original composition in a true "answer song" format by altering the physical attributes of the subject woman; a pleasing image of feminine beauty becomes bald-headed, hairy and generally repugnant. A particular note is the phrase, "the baby ain't mine" which would be completely inconsistent with the tone and story line of the original song,

c. The widespread publicity and news coverage involving 2 Live Crew, as well as my personal observation from hearing the recording, lead me to the conclusion that the intended audience for the two songs is entirely different. In other words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version.

d. In summary, it appears that the effectiveness of the satire required some evocation of the original, but that the line between infringement and fair use was not exceeded.

e. In presenting this affidavit, I should add the note that I do not purport to be a musicologist or music critic, and that the opinions expressed above are not in such claimed capacity.

s/ M William Krasilovsky
M. William Krasilovsky

Appendix H

Sworn to before me
this 31st day of July, 1990

s/ Andrew J. Feinman
Notary Public

Appendix H

EXHIBIT A — RESUME

M. William Krailovsky, Esq.
51 E. 42nd Street, Suite 1601
New York, New York 10017

M. William Krasilovsky is a partner in the firm of Feinman & Krasilovsky, specializing in music and entertainment matters. In addition to the estates of Rachmaninoff, Buddy De Silva, Ray Henderson and Fats Waller the firm also represents or has represented classic industry figures such as Aretha Franklin, Paul Anka, Burt Bacharach, Chuck Berry as well as numerous composers, publishers, recording artists, producers, studios and record companies. Mr. Krasilovsky has represented Warner Brothers publishing companies and the American Guild of Authors and Composers, has served as officer and/or director of a number of music publishing companies such as Weil-Brecht Harms Music Corporation, Peppamar Music, Inc., thus enjoying constant involvement in the negotiation and review of financial matters of such companies and their dealings with ASCAP and BMI.

Additionally, Mr. Krasilovsky is co-author of the books, "THIS BUSINESS OF MUSIC" and "MORE ABOUT THIS BUSINESS OF MUSIC," published by Billboard, the leading trade paper of the music industry. Both books have been recognized as leading reference texts by the American Library Association and ASCAP, as well as being respectfully referred to as the "bible" of the music business by working musicians and others involved in the industry.

Extremely specialized as to copyright law, Mr. Krasilovsky has been published on this subject by Columbia Teacher's College, the Copyright Society and the Performing Arts Review and has lectured at the Practicing Law Institute, Yale University, Columbia

Appendix H

University, University of Miami, New York University, Cornell University, and Brigham Young University.

Within recent years, Mr. Krasilovsky has been engaged as an expert witness in a number of litigations in various courts involving the music industry as a specialist in entertainment law. As such, he was presented by the Record Industry Association of America and was quoted favorably on appeal.

Having graduated Cornell University in 1947 and Cornell Law School in 1949 Mr. Krasilovsky has been adjunct professor at New York University during the past three years, teaching a course in ethics in the entertainment business.

APPENDIX I — MOTION TO CONVERT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524

JUDGE WISEMAN

JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a

THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION TO CONVERT DEFENDANTS' MOTION TO DISMISS TO MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Acuff-Rose Music, Inc. (Acuff-Rose), and moves this Court to designate the pending motion to dismiss a motion for summary judgment, as provided by Federal Rule of Civil Procedure 12(b). In support of this motion Acuff-Rose states:

Appendix 1

1. On August 1, 1990, Defendants filed a motion denominated Motion to Dismiss.

2. The Defendants' Motion to Dismiss presents materials outside the pleadings, including affidavits, making treatment as a motion for summary judgment appropriate under Federal Rule of Civil Procedure 12(b). Although Defendants captioned their motion as a Motion to Dismiss, Defendants acknowledge that their motion is one for summary judgment on pp. 3-4 of the Memorandum in Support of Defendants' Motion to Dismiss.

3. According to the Certificate of Service attached to the Defendant's Motion to Dismiss, a copy was served on Acuff-Rose by mail on August 1, 1990. On August 3, 1990, Counsel for Defendants informed Acuff-Rose that a copy had not yet been mailed because Defendant's counsel was waiting on an additional affidavit. Acuff-Rose obtained a copy of the Motion to Dismiss by sending a messenger to pick up a copy on August 4, 1990.

4. Defendants' Motion to Dismiss was filed without one of the supporting affidavits. This affidavit was filed on August 3, 1990, but never served on Plaintiff. Acuff-Rose obtained a copy of this filed affidavit from the clerk of the court on August 8, 1990 .

5. Pursuant to Rule 8(b) of the Local Rules of Court, if the pending motion is treated as a motion to dismiss, Acuff-Rose's response is due on August 22, 1990; if as a motion for summary judgment, on August 28, 1990.

THEREFORE, Acuff-Rose moves this Court to ORDER that Defendants' pending motion to dismiss be converted to a motion for summary judgment and be decided in conformity with Rule 56 of the Federal Rules of Civil Procedure and that Acuff-Rose shall

Appendix 1

have until August 28, 1990, in which to respond to the pending motion.

Respectfully submitted,

KING & BALLOW

By s/ E. Andrew Norwood
Alan L. Marx
Elizabeth B. Marney
E. Andrew Norwood
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue North
Nashville, TN 37219
(615) 259-3456

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Appendix I

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 1990, a true and exact copy of the foregoing was served on Defendants by placing a copy in the U.S. Mail, first class postage prepaid addressed to:

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

Sanford R. Ross
1319 16th Avenue South
Nashville, TN 37212

Alan M. Turk, Esq.
3310 West End Avenue
Nashville, TN 37203

s/ E. Andrew Norwood
E. Andrew Norwood

APPENDIX J — ORDER ALLOWING DEPOSIT OF FUNDS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

ORDER

The Defendants have moved, in accordance with Rule 67 of the Federal Rules of Civil Procedure and Local 13 of the United States District Court for the Middle District of Tennessee, to deposit $13,867.56 with the Court. The Defendants have alleged that this payment constitutes all monies owed by the Defendants to

Appendix J

the Plaintiff in accordance with the statutory rate established by the Copyright Act, 17 U.S.C. Section 101, et seq.

IT IS HEREBY ORDERED that the Defendants deposit with the Court $13,867.56. The Court will hold these funds during the pendency of this litigation or until such time as the Court determines said funds should be released to one of the parties. These funds will be automatically be rolled over into an interest bearing account unless otherwise ordered by the Court.

IT IS FURTHER ORDERED that counsel presenting this Order serve a copy thereof on the Clerk of this Court or his chief deputy personally. Absent the aforesaid service, the Clerk is hereby relieved of personal liability relative to compliance with this Order.

IT IS FURTHER ORDERED that counsel has designated that these funds be deposited in an interest bearing checking account at First American National Bank, First American Center, Nashville, TN 37201, in the name of the Clerk of the United States District Court for the Middle District of Tennessee.

IT IS FURTHER ORDERED that the Clerk has heretofore given notice to the parties that a fee will be deducted from the account pursuant to 54 Fed.Reg. 20497 (May 11, 1989). The Clerk is, therefore, directed to deduct an amount equal to the income earned and credited to the investment account for the first 45 days of income earned, and to deposit that amount in the United States Treasury.

ENTERED this __ day of August, 1990.

s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.

APPENDIX K — RESPONSE TO MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF'S RESPONSE TO THE MOTION TO DISMISS

COMES NOW the Plaintiff, Acuff-Rose Music, Inc. (Acuff-Rose), and submits this response to the Motion to Dismiss filed by the Defendants. The Motion to dismiss filed by Defendants contained affidavits that converted that motion to a Motion for Summary Judgment. In support of this response, Acuff-Rose has attached supporting declarations.

Appendix K

I. FACTS

Acuff-Rose is a Tennessee corporation that maintains offices and does business in the Middle District of Tennessee. The individual Defendants are collectively known as The 2 Live Crew, a professional musical group that performs "rap" music. The group does business in the Middle District of Tennessee. Defendant Skyywalker Records is a corporation organized under the laws of the State of Florida, with its principal place of business in Miami, Florida. Skyywalker Records does business in the Middle District of Tennessee.

Roy Orbison and William Dees were co-authors of an original musical work entitled "Oh, Pretty Women," which was registered for copyright protection on August 26, 1964, under copyright Reg. No. EP-191739. Orbison and Dees assigned their rights in "Oh, Pretty Woman" to Acuff-Rose in 1964.

The musical composition "Oh, Pretty Woman" immediately enjoyed commercial success and has remained a popular work to this day. Acuff-Rose continues to collect substantial revenues from domestic and foreign licensing of "Oh, Pretty Woman." Although receiving frequent licensing requests for "Oh, Pretty Woman," Acuff-Rose has zealously protected the copyright and has only allowed licenses that were consistent with good taste and that furthered the value of the property. License requests are granted pursuant to Acuff-Rose's long range plans for appropriate exploitation of "Oh, Pretty Woman." Typically, denied requests are not consistent with these long range plans and/or good taste or retain a risk of disparaging the future value of "Oh, Pretty Woman."

The song "Oh, Pretty Woman" has been frequently recorded

Appendix K

and widely disseminated. Defendants had access to "Oh, Pretty Woman." On July 5,1989, Defendants, through their agent, requested a license to create a derivative work based on "Oh, Pretty Woman." On July 17, 1989, Acuff-Rose sent a letter informing Defendants that the license would not be granted.

On or about July 15, 1989, Defendants released a record album entitled *As Clean As They Wanna Be*. One of the songs on *As Clean As They Wanna Be* is a musical work entitled "Pretty Woman." The liner notes and label on the album list the title of the song as "Pretty Woman" and state that it was "Written By: Roy Orbison and William Dees" and published by "Acuff-Rose (BMI)."

On July 16, 1990, Acuff-Rose filed a complaint against the defendants claiming copyright infringement, interference with business relations, and interference with prospective business advantage. On August 3, 1990, Defendants filed a motion denominated as a Motion to Dismiss. The motion filed by Defendants contained supporting materials, and, as Defendants admitted on pages 3 and 4 of their Memorandum in Support, was in fact a motion for summary judgment. *See* Rule 12(c), Fed. R. Civ. P.

II. LEGAL STANDARD

A. Motions for Summary Judgment

A summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the burden of proving that there is no genuine issue of material fact to be tried. Fed. R. Civ. P. 56, *Celotex Corp. v.*

Catrett, 477 U.S. 317 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 106 S. Ct. 2505, 2510 and 2514, 91 L. Ed. 2d 202 (1986); *Pachla v. Saunders System, Inc.*, 899 F.2d 496, 498 (6th Cir. 1990). Furthermore, " '[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962)); *Historic Preservation Guild of Bay View v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989). *See also S & H Computer Systems, Inc. v. SAS Institute, Inc.*, 568 F. Supp. 416 (M. D. Tenn. 1983) (Motion for summary judgment denied in copyright infringement case because genuine issues of fact existed regarding the alleged similarity of the two computer programs). In considering the motion, the Court must draw all reasonable inferences from the Complaint. *Walker Process Equipment, Inc. v. Ford Machinery and Chemical Corp.*, 382 U.S. 172, 174-74, 86 S. Ct. 347, 349, 15 L. Ed. 2d 247 (1965).

As is set forth below, Defendants' motion in this action must fail because genuine issues of material fact exist as to whether the use made by Defendants was a parody and whether that use was a fair use as that term is used in § 107 of the Copyright Act.[1]

B. Copyright Infringement

In order to prove a claim of copyright infringement, the plaintiff must show ownership of a valid copyright and copying by

1. Acuff-Rose points out that the Defendants filed their motion prior to the taking of any discovery in this matter.

the defendant. *Video Trip Corp. v. Lightning Video, Inc.*, 866 F.2d 50, 52 (2d Cir. 1989). Copying is ordinarily established indirectly by plaintiff's proof of access by the defendant and substantial similarity of the two works. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). Showing ownership of "valid, existing copyrights . . . automatically establishes that Plaintiffs have the exclusive right to prepare derivative works based on the copyrighted work, 17 U.S.C. § 106(2); and that Plaintiffs are entitled to prevent any unauthorized 'musical arrangement or any other form in which the work may be recast, transformed or adapted.' " *MGM v. Showcase Atlanta Coop. Prods.*, 479 F. Supp. 351, 355-56 (N.D. Ga. 1979).

"The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S. Ct. 2040, 2043, 45 L. Ed. 2d 84 (1975)). To raise their parody defense, Defendants have admitted access, substantial similarity, and copying.

III. ARGUMENT

A. A genuine issue of material fact exists as to whether Defendants' derivative work is a parody.

1. The Defendant's Work is not a Parody of the Copyrighted Work

The Defendants in this case have asserted that they were privileged to infringe Acuff-Rose's copyright because they created a derivative work that was a parody of the copyrighted work. A

genuine issue of material fact exists as to whether the derivative work prepared by Defendants is a parody.

Defendants contend that Acuff-Rose has "admitted" that their use was a parody. Acuff-Rose has never made this admission. The letter from Gerald Teifer that purportedly contains the admission simply does not say what Defendants have claimed. Moreover, parody is a term of art in the music industry, and the word has a number of different meanings, some of which differ from the meaning used by courts in considering a "parody" defense. The term "parody" is used generically to describe any use in which a copyrighted musical work has new lyrics created for it. (Teifer Declaration at ¶ 8). Defendants' use is a parody under this definition, and Teifer's letter said Acuff-Rose would *not* license "the use of a parody of 'Oh, Pretty Woman.' "

Parody has another, more specific meaning, relating to satire or burlesque. Legal opinions referring to a "parody" defense refer only to this meaning. Acuff-Rose does not admit and has never admitted that Defendants' use is a parody under the legal definition. The agent of Acuff-Rose, Gerald Teifer, who purportedly made the "admission," never heard the Defendants' derivative work at issue in this case before he wrote his letter. (Teifer Declaration at ¶ 5). Therefore, he admitted nothing about the nature of the infringing work.

In *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366, 376 (S.D.N.Y. 1979), the court defined parody in the burlesque sense discussed above. "A parody is a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule." This definition has been cited and refined by other courts. In *MGM v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979), the court held:

> [I]n order to constitute the type of parody eligible for fair use protection, parody must do more than merely achieve comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist — thereby giving the parody social value beyond its entertainment function. Otherwise, any comic use of an existing work would be protected, removing the "fair" aspect of the "fair use" doctrine and negating the underlying purpose of copyright law of protecting original works from unfair exploitation by others.

Accord, New Line Cinema Corp v. Bertlesman Music Group, 693 F. Supp. 1517, 1525 (S.D.N.Y. 1988).

Based on these definitions, a genuine issue of material fact exists as to whether the work in question even meets the legal definition of parody or is the type of parody eligible for fair use protection. The Defendants argue that their work achieves a comic effect. However, whether the infringing work makes any statement at all about the original work is an open factual question for the Court to decide. The conclusions in the Defendants' affidavits, untested by discovery or cross-examination, fall short of leaving this material fact undisputed.

To qualify for consideration as a parody, a work must be purposefully constructed as a parody. *D.C. Comics v. Unlimited Monkey Business*, 598 F. Supp. 110, 119 (N.D. Ga. 1984). "Parody in its proper role creates something new by drawing from the old; but when it has the effect of refashioning or destroying the old, it is not protected . . . Trading upon the imagination and originality of another is not fair use."

Appendix K

The Defendants have submitted an affidavit that claims their use was intended as a parody. However, this conclusory, self-serving statement has not been tested by compliance with discovery or cross-examination. In spite of Defendants' contentions, a determination that there is no genuine issue as to this material fact would be at best premature. The Defendants' infringing work has refashioned the copyrighted work and has traded on the imagination and originality of the original authors. Because a genuine issue of material fact exists as to whether this use is a parody, the Motion to Dismiss is due to be denied.

To be considered a parody, the work must also comment, at least in part, on the work parodied. *Wilson*, 425 F. Supp. 443, *affd.*, 667 F.2d 180 (2d Cir. 1981); *Walt Disney Prod. v. Mature Picture Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 n.15 (9th Cir. 1978); *accord* 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[C] at 13-90.9 (The second circuit went too far in *Elsmere* in "suggesting an open-ended standard whereby wholesale appropriation of another's work becomes possible under the banner of fair use provided only that elements of humor are added"). In *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988), plaintiffs charged that defendant's music video entitled "A Nightmare on My Street" infringed their copyrighted movie *A Nightmare on Elm Street*. The *New Line* court accepted the *Showcase* district court's definition of parody, *Id.*, at 1525, and granted the plaintiff's motion for a preliminary injunction because the court had "serious doubts" as to whether defendant's music video constituted parody under the accepted definition: the video did not "appear to make a critical comment or statement about [the movie] reflecting a unique perspective . . . [T]he video [served] solely an entertainment and promotional function for [defendant's] song." *Id.* at 1525.

Appendix K

A genuine issue as to this material fact exists. The derivative work created by Defendants does not comment on the copyrighted work. The Defendants' work is primarily about the physical attributes of women. An examination of the lyrics of the copyrighted work demonstrates that it is not about the physical attributes of women. Rather, the copyrighted work is primarily about loneliness.

If the work in question is not a parody, it is an unauthorized derivative work, unquestionably prepared without permission of the copyright owner. Preparation of a derivative work is one of the exclusive rights guaranteed to a copyright owner. 17 U.S.C. § 106 (2). *See e.g. D.C. Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984); *MGM v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351 (N.D. Ga 1979). This copying by the Defendants is an unjustifiable appropriation. The Motion to Dismiss should be denied.

2. Defendants Appropriated Too Much of the Copyrighted Work to Claim a Parody Defense

Even assuming, *arguendo*, that the Defendants' infringing work is a parody, a point Acuff-Rose specifically denies, a genuine issue of material fact exists as to whether Defendants' taking of the copyrighted work is so substantial as to be improper.

One of the earliest cases involving this issue was *Columbia Pictures Corp. v. National Broadcasting Corp.*, 137 F. Supp. 348 (S.D. Cal. 1955). The case involved a parody by Sid Ceasar of the movie *From Here to Eternity*. In *Berlin*, the court articulated what has become known as the "recall or conjure up" test.

Since a burlesquer must make a sufficient use

> of the original to recall or conjure up the subject matter being burlesqued, the law permits more extensive use of the protectable portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original.

Id. at 354.

This standard was later adopted and refined by the Second Circuit in *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964). In that case the court held:

> Where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.

The Ninth Circuit altered the standard somewhat in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978). The court held that the purported parodist had taken too much of the Walt Disney characters defendant claimed to be parodying.

> When persons are parodying a copyrighted work, the constraints of the existing precedent do not permit them to take as much of a component part as they need to make the "best parody." Instead their desire to make the "best parody" is balanced against the rights of the copyright owner in his original expressions.

In spite of these cases, the Second Circuit took a much different view of the parody standard in the later case of *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980), In a footnote to its opinion, the court stated that a more extensive use than that adopted by the recall or conjure up test might be proper. This footnote has been roundly criticized. *See, e.g.*, 3 M Nimmer, *Nimmer on Copyright* § 13.05[C] (expressing concern that this interpretation of the fair use doctrine could allow wholesale appropriation as long as humorous elements were added); W. Patry, *The Fair Use Privilege in Copyright Law* 165 (1985) (parodist may take more than necessary to conjure up, but runs risk of a finding that the infringing use was not a fair use). The Second Circuit quickly retreated from this standard in *Warner Brothers Music v. American Broadcasting, Co. Inc.*, 654 F.2d 204, 211 (2d Cir. 1981). In that case, the Second Circuit held:

> Suffice it to say that while the [parody] defense might be applicable to those *isolated instances* in which a nearly identical line from the plaintiffs' script, or express reference to one of the plaintiffs' characters was made, we question whether the defense could be used to shelter an entire work that is substantially similar [to] and in competition with the copyrighted work.

(emphasis added).

In the instant case, there is a genuine issue as to the material fact of whether Defendants used more of the copyrighted work

than was necessary to recall or conjure up "Oh, Pretty Woman." The appropriation of the music of "Oh, Pretty Woman" was substantial. (Spielman Declaration at ¶ ¶ 5 & 9). The Defendants have acted to capitalize on the widespread recognizability of the music and lyrics of "Oh, Pretty Woman." This work was a hit song when released by Roy Orbison and has become a standard that continues to generate substantial revenue including its current use in a successful motion picture under a license. (Teifer Declaration at ¶ 10). As such, it would take very little to conjure up "Oh, Pretty Woman" in the mind of the listener. Just as in the *Air Pirates* case, the Defendants' purpose here was to cash in on the widespread recognition of the copyrighted work.

The right of the Defendants to create a parody must be "balanced against the right of the plaintiff in its original expression. That balance has been struck at giving the parodist only what is necessary to conjure up the original." *Air Pirates*, 581 F.2d at 758. Where the infringer takes more than is necessary to conjure up the original, that balance tips in favor of a finding of infringement. *See D.C. Comics*, 598 F. Supp. 110, 118; *Air Pirates*, 581 F.2d at 751; *Berlin*, at 541; *Wilson*, 677 F.2d at 184-85.

The Defendants rely heavily on *Elsmere* and on *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), which relied on *Elsmere*. However, as noted above, the suggested standard set out in *Elsmere* has been largely criticized and subsequently limited in *Warner Brothers* by the very circuit court that created it. The Defendants fail to mention this point.

The case of *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), on which Defendants rely is distinguishable. In that case, the defendants used only 6 bars of a 38-bar copyrighted musical work. Here, the taking was much more substantial. (Spielman

Declaration at ¶ ¶ 6 & 7). Even the affidavit of Defendants' purported expert acknowledges that the Defendants' version uses the following: The copyrighted "4/4 drum beat introduction;" a widely recognizable bass riff at least 10 times; the chorus "Pretty Women"; and the work's original melody. As admitted in the affidavit, the Defendants' version uses 55 bars taken from the copyrighted work, including the original melody.

The Defendants exceed the bounds of use allowed by the courts by taking a substantial portion of "Oh, Pretty Woman" including its opening rhythm section, its highly recognizable bass riff, its melody line, its title, and part of its chorus. (Spielman Declaration at ¶ 7). The *Fisher* use made up 29 seconds of a 40 minute work. The infringing use of "Oh, Pretty Woman" by The 2 Live Crew was much more extensive. (Spielman Declaration ¶¶ 6-8). There is a genuine issue as to the material fact of whether Defendants' taking is too extensive to qualify for protection, assuming, *arguendo*, that their use is a parody at all.

Also, in the *Fisher* case, the defendants did not misrepresent their work as the original copyrighted work. Through their use of the names of Roy Orbison, William Dees, and Acuff-Rose, the Defendants have represented to a potential purchaser that they are using the original copyrighted material. The label and album contain no indication that the work is a "parody." A genuine issue of material fact exists with regard to whether the Defendants have made too extensive a use of the copyrighted work. Therefore, the motion should be denied.

B. A genuine issue of material fact exists as to whether the use made of "Oh, Pretty Woman" by The 2 Live Crew is a fair use under § 107 of the Copyright Act.

Appendix K

1. The Legal Standard Applicable to a Fair Use Question

To promote the widespread dissemination of ideas, the copyright system is designed to assure contributors to the store of knowledge a fair return for their labors. *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 546, 105 S. Ct. 2218, 2223, 85 L. Ed. 2d 588 (1985). To assure this fair return, the Copyright Act grants copyright holders a limited monopoly to take certain actions with regard to their works. *See* 17 U.S.C. § 106. Among these is the exclusive right to create a derivative work based on the copyrighted work. *Id.* A derivative work is "a work based upon one or more preexisting works, such as a . . . musical arrangement, sound recording, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101. In this case, the Defendants have unquestionably created a derivative work by making a musical arrangement, sound recording, and adaptation of "Oh, Pretty Woman."

The judicially created doctrine of fair use carves out a limited exception to the exclusive rights guaranteed to authors by § 106 of the Copyright Act. Fair use is now codified in § 107 of the Copyright Act. This section sets out the standard for determining whether a particular use is fair:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement

Appendix K

> of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The Defendants, in their Motion to Dismiss, have attempted to blur the distinction between parody and fair use, apparently contending that any parody use is presumptively a fair use. The cases make it clear, however, that the exact opposite is the law: a parody is not presumptively a fair use. *Fisher v. Dees* 794 F.2d 432, 435 (9th Cir. 1986). "Parody was not classified as a *presumptively* fair use . . . Each assertion of the 'parody defense' must be considered individually, in light of the statutory facts, reason, experience, and, of course, the general principles developed in past cases." *Id.* (emphasis in original). *See also New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517, 1525 (S.D.N.Y. 1988). Therefore, even assuming, *arguendo*, that the Defendants can prove that their use is a parody, a point Acuff-Rose

specifically denies, they still must prove that their parody use was a fair use as that term is defined in § 107 of the Copyright Act. A genuine issue of material fact exists as to whether the Defendants' use was fair.

The question of whether a particular use is fair is a mixed question of law and fact. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560, 105 S. Ct. 2218, 2230, 85 L. Ed. 2d 588 (1985). Only when the District Court has found facts sufficient to evaluate each of the four factors set out in § 107 may it conclude as a matter of law that the challenged use is or is not a fair use. *Id.* In this case, the facts thus far presented regarding the four factors set out in § 107 are insufficient for the Court to decide as a matter of law whether Defendants' use is fair.

The Defendants would have the Court dismiss the four-factor fair use test mandated by Congress and adopted by the courts in favor of a three-part test. (Defendants' Brief at p. 17). No court has adopted Defendants' three-part analysis. Moreover, the proposed three-part analysis would be directly contrary to the mandatory language used in § 107. Court decisions interpreting § 107 have uniformly considered the four factors that Congress mandated for evaluation of fair use questions. For example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561, 105 S. Ct. 2218, 2231, 85 L. Ed. 2d 588 (1985), the Supreme Court held that § 107 requires a case-by-case analysis and noted that the factors are non-exclusive. No case stands for the proposition that fewer than the four factors are to be considered. To the contrary, § 107 of the Copyright Act of 1576 explicitly states "In determining whether the use made of a work in any particular case is a fair use the factors to be considered *shall* include . . ." 17 U.S.C. § 106. The mandatory consideration of the four factors is self-evident. Accordingly, this case must be examined in light of at

least the four non-exclusive factors set out in § 107. *See Bourne Co. v. Speeks*, 670 F. Supp. 777, 780 (E.D. Tenn. 1987).

As demonstrated below, application of the four factors to the facts of this case as thus far developed makes it clear that a genuine issue exists as to material facts.

Defendants also assert that the Court should adopt an "economic model" of fair use analysis, citing a law review note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395 (1984). This model, according to Defendants, suggests that any use of social value should be considered fair, *if it does not substitute for exploitation of the original work.* In this case, the Defendants' work does substitute for Acuff-Rose's exploitation of the work. Exploitation is not limited to Roy Orbison's recording of the work, but includes licenses for derivative uses. (Teifer Declaration at ¶ 10). The note cited above recognizes this fact. "The 'economic' model of fair use posits that socially valuable use of an original should be limited only when the taking would result in significant commercial harm to the holder of the copyright." *Id.* at 1398. Thus, even if Defendants' "economic model" were the law, there is a genuine issue of material fact present in this case.

a. The Purpose and Character of the use

The first factor set out for consideration in § 107 is the purpose and character of the use, including whether the use is of a commercial nature. The fact that a publication is commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. "Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Harper &*

Row, 471 U.S. at 562, 105 S. Ct. at 2231 (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 454, 104 S. Ct. 774, 793, 78 L. Ed. 2d 574 (1984). Where a use is for commercial purposes, this factor weighs in favor of the party claiming the infringement. "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.*, 464 U.S. at 562, 105 S. Ct. at 2231.

In this case, there can be no dispute that the Defendants' use of "Oh, Pretty Woman" was for a commercial purpose and, regardless of motive, the Defendants stood to profit from their unauthorized use of Acuff-Rose's copyrighted material. The work the Defendants created was included on a commercially distributed record album sold for the purpose of making a profit. Defendants in this case used the copyrighted material without paying any price whatsoever. This factor of the fair use analysis weighs in favor of the copyright holder, Acuff-Rose. This use was presumptively an unfair exploitation of Acuff-Rose's monopoly privilege to create a derivative work under § 106(2).

b. Nature of the Copyrighted Work

The second factor that Congress mandated for consideration is the nature of the copyrighted work. This factor weighs in favor of the copyright holder where the work is creative and expressive rather than merely factual. This fair use factor also favors Acuff-Rose.

In *MCA Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981), the court held that under this factor it was important to consider whether the work taken was creative, imaginative, and original and

whether it represented a substantial investment of time and labor made in anticipation of a financial return. similarly, in *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986), the court held that the scope of fair use was greater when informational, as opposed to creative, works were involved. *See also Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983); 3 M. Nimmer, *Nimmer on Copyright* § 13.05[a][2].

Once again, there can be no dispute that the material copied by Defendants was creative and imaginative, not merely factual. Roy Orbison and William Dees both invested time and labor to create "Oh, Pretty Woman" in expectation of financial return. The nature of the copyrighted work factor of the fair use analysis weighs in favor of Acuff-Rose, the copyright holder.

Furthermore, musical works deserve special protection under this factor of the analysis. Musical works such as "Oh, Pretty Woman" are unique in that they involve two separate and distinct elements — music and lyrics — both of which are deserving of protection. *See* 1 M. Nimmer, *Nimmer on Copyright* § 2.05[B]; *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393 (S.D.N.Y. 1973). Both the music and the lyrics are creative elements deserving copyright protection, as opposed to the usual case involving only words. This distinction in the nature of the work weighs this factor even more heavily in favor of Acuff-Rose.

c. Amount and Substantiality of the Portion Used

The third factor in the fair use analysis is the amount and substantiality of the portion of the work used. Courts break this factor into a two-pronged analysis. The first of these two prongs is the quantitative analysis, i.e. how much is used; the second prong is the qualitative analysis, i.e. how important is the portion used.

i. Quantitative

This prong of the amount and substantially of the portion used factor examines how much of the original work was taken and how much of the new work it comprises. The statutory substantiality consideration should examine "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." *Harper & Row*, 471 U.S. at 564, 105 S. Ct. at 2233.

In *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976), the court decided that the taking was substantial. The case involved a "parody" of the song "Boogie Woogie Bugle Boy of Company B." The "parody" was called "Cunnilingus Champion of Co. C." The district court in *Wilson* considered persuasive the following items of evidence relating to the amount of the work that was used: copying "Bugle Boy's" "eight to the bar rhythm," the similarity and alliteration of both songs' titles, and the "similarity in the movement of the musical [lines]." *Wilson*, 425 F. Supp. at 447-48. On the appeal of this case, the circuit court concluded, "Use of copyrighted material without the owner's consent generally will not be considered reasonable if it extensively copies or paraphrases the original . . . ." *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

In *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), heavily relied on by Defendants, the court found that the infringer had used only six of the song's 38 bars of music and that the use made up only 29 *seconds* of the 40 *minute* total of the record album. The Defendants in this case have used much more than that. (Spielman Declaration at ¶ ¶ 6-8). However, even use of a small amount of a work can be an unfair use. In *Harper & Row*, the infringers used only 300 words of a 200,000 word book and the words taken constituted only 13 percent of the infringing article. Nonetheless, the Supreme Court concluded that the use was not fair.

In this case, the Defendants have unquestionably used a substantial portion of Acuff-Rose's copyrighted work. *See* Spielman Declaration. The quantitative portion of the analysis is therefore unquestionably in favor of Acuff-Rose.

ii. Qualitative

This prong analyzing of the amount and substantiality of the portion used factor examines the quality, or importance, of the material that is lifted from the copyrighted work. This factor was key in the *Harper & Row* case. In that case the *Nation* magazine had excerpted portions of Gerald Ford's upcoming biography. Although the quotations used were only a small part of the total biography, the Supreme Court held that the defendant had taken the "heart" of the work. The Court concluded the particular portions taken were chosen "because they qualitatively embodied Ford's distinctive expression." *Harper & Row*, 471 U.S. at 565, 105 S. Ct. at 2233. Accordingly, the Supreme Court rejected the conclusion of the Second Circuit Court of Appeals that the defendant's taking was "meager," where the "expressive value of the excerpts and their key role in the infringing work" were qualitatively significant. *See Harper & Row*, 471 U.S. at 565-66, 105 S. Ct. at 2233. *See also Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987).

Further, a taking that is "insubstantial with respect to the *infringing* work" does not necessarily find shelter under fair use. *Harper & Row*, 471 U.S. at 565, 105 S. Ct. at 2233. Quoting Judge Learned Hand, the Supreme Court observed, " 'no plagiarist can excuse the wrong by showing how much of his work he did not pirate.' " *Id.* (citation omitted).

As discussed above, the portions taken from "Oh, Pretty

Woman" are qualitatively significant to the unique identity of the original. (Spielman Declaration at ¶ 7-9). In fact, those portions constitute the heart of "Oh, Pretty Woman." The Defendants took key passages from the copyrighted work that were chosen for their world-wide recognizable value, including the key words from its name. Defendants took the catchy and repetitive guitar refrain, of "Oh, Pretty Woman." Defendants used that same guitar refrain, as well as the opening drum beat, the opening lyric, the melody, and the chorus of "Oh, Pretty Woman" throughout their infringing derivative work in order to catch and sustain the listener's attention and to capitalize on the copyrighted composition. In so doing, Defendants took the "heart" of Acuff-Rose's copyrighted work.

The Defendants should not be allowed to prosper from repeatedly displaying the most ingenious portions of "Oh, Pretty Woman." Thus, this factor weighs decidedly in favor of Acuff-Rose. At the very least, a genuine issue exists as to this material fact. A comparison of the declaration submitted by Acuff-Rose's expert and the affidavit submitted by Defendants' expert shows that whether Defendants took too much of "Oh, Pretty Woman" is squarely at issue in this case. *Compare* Brand affidavit *with* Spielman Declaration at ¶¶ 7-9).

The Defendants admit in their brief that courts tend to find extensive takings unreasonable particularly when the contested use is parody because the parodist has derisively turned the original author's work against him. (Brief at 14). The Defendants then argue, citing only a law review article, that this is inconsistent with the goal of the Copyright Act. The Defendants ignore the fact that the goal of the Copyright Act is achieved by granting the copyright holder a monopoly in a particular work. *Harper & Row*, 471 U.S. at 546, 105 S. Ct. at 2223. To allow wholesale uses of the work under the guise of fair use would undercut the Copyright Act

by denying the Congressional grant of monopoly rights to copyright holders and thereby discourage individuals from making their works public. In *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988), the court pointed out "[b]ecause the copyright laws exist to stimulate artistic creativity for the benefit of the public, care must be taken to ensure the artist has sufficient financial motivation for creativity." *Id.* at 1527 (citing *Wilson*, 677 F.2d at 183). For this reason Congress mandated, and the courts have consistently held, that an examination of the amount of the copyrighted work used should be considered when fair use determinations are made.

Because the parties vigorously dispute whether the amount taken constitutes a fair use of Acuff-Rose's copyrighted property, a genuine issue of material fact exists. Because this issue cannot be decided as a matter of law, Defendants' motion should be denied.

d. Effect on Potential Market for or Value of the Work

The fourth factor to be considered in determining whether a particular infringement is a fair use is the effect the new work will have on the potential market for or value of the copyrighted work. This factor is regularly described by courts as the most important of the four. *Harper & Row*, 471 U.S. 566, 105 S. Ct. at 2233. " 'Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.' " *Id.* at 566-67, 105 S. Ct. at 2234 (quoting 1 M. Nimmer, *Nimmer on Copyright*, § 1.10[D] , at 1-87); *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986). To negate a fair use defense, "one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.' This inquiry

must take account not only of harm to the original but also of harm to the market for *derivative* works." *Harper & Row,* 471 U.S. at 568, 105 S. Ct. at 2234 (quoting *Sony Corp.*, 464 U.S. 417, 104 S. Ct. 774, 793, 78 L. Ed. 2d 574) (emphasis added).

The Defendants argue that their work must "usurp" the market for Acuff-Rose's original work for this factor to weigh in favor of Acuff-Rose. This position is incorrect.[2] Defendants attempt to establish through the affidavit of a purported expert that their work will not interfere with sales of Acuff-Rose's work because the audiences for performances by Roy Orbison and The 2 Live Crew are different. Not only is this point in dispute, the argument misses the mark. A defendant may rebut an initial *presumption* of unfair exploitation by "convincing the court that the parody does not unfairly diminish the economic value of the original." *Fisher,* 749 F.2d at 437 (citing *Pillsbury Co. v. Milky Way Productions,* 215 U.S.P.Q. 124, 131 & n.9 (N.D. Ga. 1981) (emphasis added) (copy attached). This statement of the law is a far cry from a holding that the defendant is excused if its work does not usurp the market for the copyrighted work.

The owner of the copyright need prove only *some* meaningful likelihood of future harm to have this factor weigh in its favor. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986). "The owner need only show that, should the challenged use become widespread, it would adversely affect the potential market for the work." *Id.* citing *Sony Corp.*, 464 U.S. at

2. Obviously, Defendants' work and the copyrighted work are in competition in the pre-recorded music market. Through their use of the names of Roy Orbison, William Dees, and Acuff-Rose, the Defendants have represented to the potential purchaser that they are using the original copyrighted material. The label and album contain no indication that the work is a "parody."

451, 104 S. Ct. at 793 and *Harper & Row,* 105 S. Ct. at 2234-35. "The absence of measurable pecuniary damages does not require a finding of fair use." *Marcus v. Rowley,* 695 F.2d 1171, 1177 (9th Cir. 1983). As Professor Nimmer has pointed out, it is a mistake to view this factor as raising the question of damages to the plaintiff caused by the activities of the defendant. 3 M. Nimmer, *Nimmer on Copyright* § 13.05 [A]. "This factor rather poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's present work." *Id.*

The analysis focuses on the effect of the taking "upon the *potential* market for or value of the copyrighted work." *Fisher,* 749 F.2d at 437 (emphasis added); *MCA, Inc. v. Wilson,* 677 F.2d 180, 183 (2d Cir. 1981) (recognizing that it is the "expectation of gain" that must be considered). Thus, the decision turns on the potential market for the protected property.

The copyrighted work in this case is the music and lyrics of "Oh, Pretty Woman."[3] Not only does Acuff-Rose have the right to protect its existing work and market, but also Acuff-Rose has the right to protect the opportunity to sell the work in the future. *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987). The Defendants totally ignore these future opportunities. The *New Line* court pointed out that beyond the immediate market for a copyrighted work, derivative works of the plaintiff, "either already in existence or potential, that may be adversely affected by the

3. The Defendants err in concluding that the market for the copyrighted work is limited to the "Roy Orbison audience." (Teifer Declaration at ¶ 11). Because the copyrighted work in this case includes the music and lyrics of "Oh, Pretty Woman," Roy Orbison's recording of that song is not the only issue.

allegedly infringing work" should be considered by courts when evaluating the effect of a defendant's use. *New Line*, 693 F. Supp. at 1528 (citations omitted). *See also Harper & Row*, 471 U.S. at 568, 105 S. Ct. at 2234 (inquiry must account of harm not only to the original but also to the market for derivative works). "If the defendant's work adversely affects the value of any of the rights in the copyrighted work, the use is not fair even if the rights thus affected have not as yet been exercised by the plaintiff." 3 M. Nimmer, *Nimmer on Copyright* § 13.05[B]. The Defendants in the instant case have created a derivative work that interferes with Acuff-Rose's future opportunities.

In the *Hustler* case, the court held that three factors should be considered in deciding whether the infringing use has harmed the market for or value of the copyrighted work. These considerations are whether the infringing work: (1) tends to diminish or prejudice the potential sale of the work; or (2) tends to interfere with the marketability of the work; or (3) fulfills the demand for the original work. *Hustler*, 796 F.2d at 1155-56 (numerous citations omitted). In this case, the Defendants would have this Court focus solely on the third of these three components, which is simply not the law. Obviously the parties dispute the damage that the Defendants' unauthorized taking has caused and will cause to the copyrighted work. *Compare* Brand affidavit *with* Teifer Declaration at ¶ ¶ 11 & 12.

At least one other element has been considered in evaluating the potential market factor. In *D.C. Comics, Inc. v. Unlimited Monkey Business*, 598 F. Supp. 110, 119 (N.D. Ga. 1984), the court held that an effect on the potential market could result from "bawdy associations" created by the infringer's adaptations by tarnishing the copyrighted work. In the past, Acuff-Rose has been very successful in licensing the rights on "Oh, Pretty Woman."

However, a shadow has been cast over those licensing opportunities because of infringement by Defendants, whose unsavory activities have received wide publicity. (Teifer Declaration at ¶ 12)

Furthermore, as pointed out above, satisfaction of the demand for the original work is only one consideration. The effect on the potential market factor weighs the *impairment* of the market, not its total domination. This, the most important of all the factors, weighs in favor of Acuff-Rose. At the very least, there is a genuine issue about which party this factor favors. The motion therefore should be denied.

In this case, the use of "Oh, Pretty Woman" has damaged Acuff-Rose's expectation of gain in a number of ways. First, Acuff-Rose has lost the opportunity to prepare a derivative work from "Oh, Pretty Woman" that would appeal to a rap music audience. By making their unauthorized derivative work, Defendants have taken this opportunity from Acuff-Rose. Second, Acuff-Rose has lost the opportunity to authorize a burlesque version of "Oh, Pretty Woman" because Defendants claim to have created that work. Third, "Oh, Pretty Woman" has been tarnished by being associated with these lyrics and with The 2 Live Crew. Fourth, and most importantly, Acuff-Rose has lost the opportunity of future licensing arrangements because "Oh, Pretty Woman" will now be associated with Defendants and with their lyrics. (Teifer Declaration at ¶ 12).

Contrary to Defendants' simplistic position, they cannot demand that Acuff-Rose prove[4] actual harm to this property by the infringing use. When reasonable minds cannot disagree that the

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4. Defendants have the burden to prove the defense of fair use.

infringement diminishes the copyrighted work by dirtying it, potential harm to the owner's market is clear. There is no clear way to tell in which markets the copyrighted work might have become valuable, but that is not Acuff-Rose's burden. It is not proof of actual harm that is required, but proof of harm that would occur if the infringing use became widespread. *Sony Corp.*, 464 U.S. at 451, 104 S. Ct. at 793; *Harper & Row*, 471 U.S. at 568, 105 S. Ct. at 2234-35. The Defendants' affidavits state that the two works at issue here do not compete, but these very conclusory statements do not mean a material fact is not at issue. In the face of such an issue, the Court should deny the Defendants' motion.

The Defendants cite both *Walt Disney Productions v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975), and *MCA Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976). Defendants acknowledge that in those cases the copyright holders sued successfully, not just so their works could be sold elsewhere but to prevent uses that were thought to degrade the ideals presented by the materials. (Defendants' Brief at 28). This is exactly the point here. One of the reasons Acuff-Rose has brought suit is to prevent the besmirching of its copyrighted work. Defendants' argument that only usurpation of a particular market is a proper reason for denying fair use protection is without merit. Obviously, safeguarding the value of the work is also a valid reason for denying fair use protection.

The Defendants also cite *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 USPQ 124 (N.D. Ga. 1981) for the proposition that what could be considered offensive to one person might not be offensive to another. Defendants' reliance on *Pillsbury*, in addition to being a concession that their infringing use of Acuff-Rose's "Oh, Pretty Woman" is offensive, is misplaced. That case is distinguishable on two different grounds. First, the

instant case is about protecting a copyrighted work — "Oh, Pretty Woman." Whether that work has been disparaged is only a small element of the overall case going to Defendants' ultimate burden to prove fair use. Just because some people might prefer or approve of Defendants' unauthorized derivative work does not mean that the use they have made is fair. Second, the court pointed out in the *Pillsbury* case that the infringement was located on the inside of a magazine, not on the cover where it might be interpreted as an attempt to capitalize on the copyrighted work. Here, the Defendants have capitalized on the copyrighted work by including the name "Pretty Woman" and the names of William Dees, Roy Orbison, and Acuff-Rose on the cover and label copy of their work. There can be no doubt that this attribution is an attempt to capitalize on a work that enjoys world-wide recognition and acclaim.

e. Other Factors to be Considered

In addition to the four factors set out in § 107, Congress recognized that other factors could be examined in determining whether a particular use was fair. Section 107 "requires a case-by-case determination whether a particular use is fair, and the statute notes four *nonexclusive* factors to be considered." 17 U.S.C. § 107; *Harper & Row*, 471 U.S. at 549, 560, 105 S. Ct. at 2225, 2230 (emphasis added).

An additional factor that courts have discussed and considered is the bad faith of the infringer. *See Harper & Row*, 471 U.S. at 562, 105 S. Ct. at 2232 (quoting 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-72. Courts have contemplated evidence of bad faith as a nonstatutory consideration when weighing an infringer's claim of fair use of a copyrighted property. "Fair use presupposes 'good faith' and 'fair dealing.' " *Harper*,

471 U.S. at 562, 105 S. Ct. at 2232 (quoting *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968)). *See also Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990) (court suggests factor militating against fair use is whether paraphrasing and copying were done in good faith or with an evasive motive); *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (court considered factor but rejected copyright holder's bad faith claim).

In this case, the Defendants sought permission to create a derivative work based on "Oh, Pretty Woman." However, this permission was not sought until the derivative work was already completed and within less than a month before the album went on sale. Furthermore, until well after this lawsuit was commenced, the Defendants made no attempt to pay any mechanical or other royalty to Acuff-Rose, even though they obviously knew that Acuff-Rose owned the copyright and was due a mechanical royalty.[5] Therefore, a genuine issue of material fact exists regarding this additional, nonstatutory consideration. The motion should be denied.

C. Counts II and III of the Complaint are not Preempted by the Copyright Act.

The Defendants contend that Counts II and III of the Complaint should be dismissed because they are preempted by the Copyright Act. These state law claims are not preempted by the Copyright Act. First, 17 U.S.C. § 301(b)(3) clearly exempts certain state causes of action from the preemption provisions of the Act.

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5. The Defendants subsequently moved to pay money into the Court for royalties.

> Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —
>
> > (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by § 106.

The rights protected by the Tennessee common law and state statutes are not preempted where those laws are not equivalent to any of the exclusive rights provided by § 106. Counts II and III of the complaint are not equivalent to any rights provided by § 106.

The Defendants also contend that Acuff-Rose has not pleaded how the infringing derivative work will interfere with its rights. Under the rules of notice pleading, there is no requirement that Acuff-Rose plead in such a manner. Fed. R. Civ. P. 8(a)(2); *State of Tennessee ex rel. Davis v. Hartman*, 306 F. Supp. 610 (E.D. Tenn. 1969). However, any questions about this should be answered by the attached declaration of Gerald Teifer. Further, Acuff-Rose expects to discover further evidence in support of its claims during the discovery process. Acuff-Rose filed discovery along with its complaint. No objection has been filed to this discovery and no response has yet been made by the Defendants.

IV. CONCLUSION

Based on the foregoing, Acuff-Rose submits that, taking all the facts in the light most favorable to it, this case presents a genuine issue of material fact. Accordingly, Acuff-Rose requests that the Court deny the Motion to Dismiss filed by the Defendants.

Appendix K

Respectfully submitted,

KING & BALLOW
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Appendix K

CERTIFICATE OF SERVICE

I hereby certify that on August 28th, 1990 a true and exact copy of the foregoing was served on Defendants by placing a copy of same in the U.S. Mail, postage prepaid thereon, addressed to:

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

Sanford R. Ross, Esq.
1319 16th Avenue South
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Nashville, TN 37203

APPENDIX L — DECLARATION OF EARL V. SPIELMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a/ Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DECLARATION OF EARL V. SPIELMAN

Pursuant to 28 U.S.C. § 1746, I, Earl V. Spielman, declare under penalty of perjury, and under the Laws of the United States of America, and of my own knowledge:

1. I am a musicologist with a Ph.D. degree in musicology from the University of Wisconsin-Madison.

Appendix L

2. I have served on the faculty of the University of Hawaii and the University of Tennessee-Nashville. I have delivered lectures at the Vanderbilt University Law School, the Vanderbilt University Music Department, and at the Southern Illinois Music Department. I have published numerous articles in the area of musical performance style and stylistic analysis. I have worked full-time for 15 years in the commercial music industry. I have been qualified as an expert to testify in trials and other judicial proceedings.

3. I have also worked in the recording industry as an arranger, contractor, record producer, studio musician, songwriter, and publisher.

4. I have examined and compared the musical work "Pretty Woman" as recorded by The 2 Live Crew, with "Oh, Pretty Woman."

5. As a result of this comparison, I have concluded that the works are substantially similar.

6. The factors that are most important in determining substantial similarity from a musicological point of view are the succession of actual pitches within a given rhythmic framework, and the harmonic progressions used in a composition. Other parameters, such as the key, meter and tempo of a performance, the formal structure and the way in which sections and phrases are organized, and similarity of melodic-rhythm contribute to the body of evidence of similarity.

7. After extensive analysis, I have been able to discern a significant amount of similarity between the two works listed above, These include:

a. the one measure guitar lick, which is repeated over and over again in the intro and subsequent transition sections (and which may have actually been sampled or lifted and then incorporated into the recording of "Pretty Woman" as performed by The 2 Live Crew);

b. the duplication of the opening line of text of "Oh, Pretty Woman" and the use of the words of the title an additional six times in the course of the remainder of "Pretty Woman";

c. The melodic line of the verse sections of the respective songs;

d. the melodic line of the bridge sections of the respective songs;

e. aspects of the formal structures; the opening measure of percussion; the lyrical structures of the respective texts; and the fact that both works are performed in the same key and at approximately the same tempo.

8. Apart from the detailed analysis of each isolated musical parameter, if someone were to just listen to the sound sources of the two works at issue, no matter what the extent of their musical knowledge or degree of sophistication, one would immediately recognize that "Pretty Woman" was modeled after "Oh, Pretty Woman."

9. Consequently, barring any additional evidence to the contrary, and resulting strictly from analysis of the musical works at issue, from a musicological perspective I find that there is a remarkable degree of similarity between the two works, in terms of both textual and musical materials, similarities which cannot be

explained to have come about as a result of coincidence or totally independent creation.

Further Declarant saith not.

August 28, 1990
Date

s/ Earl V. Spielman
EARL V. SPIELMAN

APPENDIX M — DECLARATION OF GERALD E. TEIFER

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a/ Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DECLARATION OF GERALD E. TEIFER

Pursuant to 28 U.S.C. § 1746, I, Gerald E. Teifer, declare under penalty of perjury, and under the Laws of the United States of America, and of my own knowledge:

1. I am Director of Licensing for Acuff-Rose Music, Inc., and

have been employed by Opryland USA since the Fall of 1985. I have been involved in the music industry for over 35 years.

2. In my capacity as Director of Licensing, I review requests for permission to use copyrighted materials that Acuff-Rose owns.

3. Acuff-Rose owns the copyright in "Oh, Pretty Woman" written by Roy Orbison and William Dees.

4. I have seen a copy of a letter from Linda Fine to me requesting a license for The 2 Live Crew to create a derivative version of the work "Oh, Pretty Woman."

5. I do not remember reading the lyrics for this work. I never heard a cassette tape of this work prior to July 17, 1989.

6. I have seen a copy of a letter dated July 17, 1989, which I signed, denying the license referred to above.

7. In that letter I use the term "parody."

8. I use the word parody to describe any derivative work; i.e., any work in which the melody of an existing work is coupled with new lyrics. Based on my experience in the music industry, I consider this a common custom and usage surrounding the term.

9. Over the years since Acuff-Rose registered the copyright in "Oh, Pretty Worman," it has carefully guarded its copyright in "Oh, Pretty Woman," and has prevented uses that would have disparaged or tainted the work.

10. "Oh, Pretty Woman" was a hit following its release. It is now a standard and generates significant foreign and domestic

Appendix M

revenue. Acuff-Rose receives frequent licensing requests for individuals to use "Oh, Pretty Woman." These requests range from uses of the song in a current hit movie and other productions to advertising and marketing campaigns.

11. The market for the rights to "Oh, Pretty Woman" extends beyond the audience for Roy Orbison's performance of that work.

12. If The 2 Live Crew's derivative work should become widespread, it would further impair the value of the copyrighted work, and future opportunities for licensing it.

Further Declarant saith not.

August 28, 1990
Date

s/ Gerald E. Teifer
GERALD E. TEIFER

APPENDIX N — DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a/ Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Appendix N

I

PREFACE

Comes now the Defendants, who file this Supplemental Memorandum in response to the Plaintiff's responsive pleading to the Defendants' Motion to Dismiss. The Defendants reiterate their request for oral argument to afford the Court an opportunity to listen to the Plaintiff's original work and compare same to the parody performed by the Defendants. The Defendants respectfully assert that the determination as to whether or not this parody constitutes fair use under 17 U.S.C. Section 107 of the Copyright Act vest exclusively with the Court.

II

WHETHER THE DEFENDANTS' PARODY IS FAIR USE IS A JUDICIAL DETERMINATION

17 U.S.C. Section 107 provides in part:

> . . . In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

Appendix N

> (4) the effect of the use upon the potential market for or value of the copyrighted work.

In *Harper and Row Publishers v. Nation Enterprises,* 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985), the United States Supreme Court specifically stated that "fair use is a mixed question of law and fact" and that "where the District Court has found facts sufficient to evaluate each of the statutory factors" an appellant court may conclude as a matter of law without remanding for further fact finding" the issue of whether or not a challenged use qualifies as fair use of the copyrighted work. In *Fisher v. Dees,* 794 F.2d 432, 436 (9th Cir. 1986), the Ninth Circuit held that "no material historical facts are at issue in this case. The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because, under *Harper and Row,* these judgments are legal in nature, we can make them without usurping the function of the jury."

The Plaintiff argues that "Defendants' motion in this action must fail because genuine issues of material fact exist as to whether the use made by Defendants was a parody and whether that use was a fair use as the term in used in Section 107 of the Copyright Act." (Plaintiff's Memorandum of Law, p.4) The Plaintiff argues "A genuine issue of material fact exists as to whether the derivative work prepared by Defendants is a parody." (Plaintiff's Memorandum of Law, p. 6) The Plaintiff also argues "whether the infringing work makes any statement at all about the original work is an open factual question for the court to decide." (Plaintiff's Memorandum of Law, pp. 7, 8) The Plaintiff argues "A genuine issue of material fact exists with regard to whether the Defendants have made too extensive a use of the copyrighted work." (Plaintiff's Memorandum of Law, p. 14) Lastly, the Plaintiff argues

Appendix N

that "The Defendants' work does substitute for Acuff-Rose exploitation of work. Exploitation is not limited to Roy Orbison's recording of the work, but includes licenses for derivative works." (Plaintiff's Memorandum of Law, p. 18)

The Defendants submit that each of these alleged disputed issues of material fact are mixed questions of law and fact to be determined by the Court. The Defendants respectfully assert that the Court can determine each of these issues by simply listening to the original work and comparing same to the parody.

III

THE PLAINTIFF DOES NOT HAVE A MORAL RIGHT IN ITS COPYRIGHTED WORK

Certain European and other countries have long recognized rights which are personal to authors, and as such viable separate and apart from the proprietary aspect of copyright. These right are known as droit moral, or moral rights. They may be generally summarized as including the following author's rights: to be known as the author of his work; to prevent others from falsely attributing to him the authorship of work which he has not in fact written; to prevent others from making deforming changes in his work; to withdraw a published work from the distribution if it no longer represents the views of the author; and to prevent others from using the work or the author's name in such a way as to reflect on his professional standing. See generally Strauss, "The Moral Right of the Author," 2 *Studies on Copyright* 963 (Fisher ed. 1963); Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law," 16 Am.J.Comp. Law 487 (1968); Merryman, "The Refrigerator of Bernard Buffet," 27 Hasting L.J. 1023 (1976).

Appendix N

In 1988, the United States sought to become a member of the Berne Conference (hereinafter referred to as "BCIA"), an international treaty concerning copyright protection. In Congress, the bill which adopted the BCIA refused to acknowledge the European concept of moral right. As stated in *Nimmer,* The Law of Copyright Section 8.2[a], page 8-250:

> During the debate over BCIA, Congress faced an avalanche of opposition to moral rights, including denunciations of moral rights by some of the bill's most vociferous advocates. If the BCIA had any hope of passage, the task was presented of fashioning a method for the United States to join the Berne Union without incorporating Berne-style moral rights provisions into the fabric of American law. The law as passed purports to satisfy that goal.

As part of the legislative history of the BCIA, the House "Committee stat[ed] unequivocally that Berne is not self-executing, that domestic law is not in any way altered except through the implementing legislation itself, and that the implementing legislation is absolutely neutral on the issue of the rights of paternity and integrity." The BCIA itself states that the adherence of the United States to the Berne Convention and passage of the BCIA "do not expand or reduce any right of an author" to assert the right of attribution and integrity in any copyrightable work. Congress, in short, intended to be completely noncommittal on how moral rights should develop in the future.

Clearly, American Jurisprudence and the Copyright Act of 1976 has not recognized an artist's moral right in his work. *Gilliam v. American Broadcasting Cos.*, 538 F.2d (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, right of authors."); *Varqas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947); *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup.Ct. 1949). See *Granz v. Harris*, 198 F.2d 585, 589 (2d Cir. 1952) (concurring opinion per Frank, J.) for a discussion of the rejection by American court of the term "moral rights." See *Stevens v. National Broadcasting Co.*, 148 U.S.P.Q. 755 (Cal. Super.Ct. 1966); *Geisel v. Poynter Prods., Inc.*, 295 F.Supp. 331 (S.D.N.Y. 1968) ("[T]he doctrine of moral right is not part of the law in the United States . . . except insofar as parts of that doctrine exist in our law as specific rights — such as copyright, libel, privacy and unfair competition.") *Cf. Shostakovich v. Twentieth Century-Fox File Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575 (1948), aff'd, 275 App.Div. 692, 87 N.Y.S.2d 430 (1949); *Edison v. Viva Intern., Ltd.*, 70 App.Div.2d 379, 421 N.Y.S.2d 203 (1979) ("a right analogous to 'moral right', though not referred to as such, has been recognized in this country . . ."). American Jurisprudence does recognize an artist's contractual rights to maintain the integrity of his work. However, the parties in the base at bar had no contractual relationship.

The Plaintiff argues that "Although receiving frequent licensing request for 'Oh, Pretty Woman,' Acuff-Rose has zealously protected the copyright and has only allowed licenses that were consistent with good taste and that furthered the value of the property. License requests are granted pursuant to Acuff-Rose's long range plans for appropriate exploitation of 'Oh, Pretty Woman.' Typically, denied requests are not consistent with these

long range plan and/or good taste or retain a risk of disparaging the future value of 'Oh, Pretty Woman.' The song 'Oh, Pretty Woman' has been frequently recorded and widely disseminated." (Plaintiff's Memorandum of Law, p. 2) The Plaintiff further argues that "In the past, Acuff-Rose has been very successful in licensing the rights to 'Oh, Pretty Woman.' However, a shadow has been cast over those licensing opportunities because of infringement by Defendants, whose unsavory activities have received wide publicity. (Teifer Declaration at paragraph 12)." (Plaintiff's Memorandum of Law, p. 29) Lastly, the Defendants represent to the Court that the Plaintiff's copyright work "has become a standard that continues to generate substantial revenue, including its current use in a successful motion picture under a license. (Teifer Declaration at paragraph 10)." (Plaintiff's Memorandum of Law, p. 12) The Plaintiff fails to cite any case law in support of its argument that it has a right to discriminate as to what artists may perform its copyrighted work and as to what artists may prepare a derivative parody of its copyrighted work. Under American Jurisprudence no moral right is granted a copyright owner under the 1976 Copyright Act.

The Plaintiff alleges that it has "only allowed licenses that were consistent with good taste and that furthered the value of the property." (Plaintiff's Memorandum of Law, p. 2) The successful motion picture entitled "Pretty Woman" referenced by the Plaintiff is about a common street prostitute. In the movie, the Plaintiff's copyrighted work is associated with the character played by Julia Roberts, who plays a whore. In 1972, the rock group Van Halen, who are widely known for their sexually suggestive performances, did a musical video of the Plaintiff's copyrighted work, "Oh, Pretty Woman." The Plaintiff's allegation that "a shadow has been cast over these licensing opportunities because of the infringement by Defendants, whose unsavory activities have received wide publicity" and its allegation that "Acuff-Rose has lost the

opportunity of future licensing arrangements because of 'Oh, Pretty Woman' will now be associated with Defendants and with their lyrics (Teifer Declaration at paragraph 12)", constitutes nothing more than prejudice discrimination.

The Plaintiff further alleges that the Defendants' parody "diminishes the copyrighted work by dirtying it." This argument is ridiculous. The Court has been furnished with a copy of the lyrics of the Defendants' parody. The Defendants submit that there is nothing dirty or unsavory about these lyrics. The Plaintiff does not, according to the applicable law, despite its allegations, have a right to determine that the Defendants are unsavory and inconsistent with its opinion as to "good taste."

IV

THE PLAINTIFF HAS ADMITTED THAT DEFENDANTS' WORK IS A PARODY

The Plaintiff argues that the letter from its agent, Gerald Teifer, dated July 17, 1989, to Linda Fine, agent of the Defendants, did not constitute an admission that the Defendants' work is a parody. (Plaintiff's Memorandum of Law, pp. 6, 7) (See Declaration of Gerald E. Teifer, paragraphs 4-8) The Plaintiff, through its agent, Teifer, attempt to deny this admission. The Plaintiff and its agent, Teifer, ignore that Linda Fine, the Defendants' agent, previously sent to Teifer a copy of the lyrics and a cassette of the Defendants' parody prior to Teifer's admission. (Exhibit A)

V

THE DEFENDANTS CANNOT BE PREJUDICED BECAUSE THEY SOUGHT PERMISSION FROM THE PLAINTIFF TO PREPARE THEIR PARODY

The Plaintiff criticizes the Defendants for seeking permission to prepare the derivative parody work. (Plaintiff's Memorandum of Law, p. 32) However, in *Fisher v. Dees*, the Court noted that:

> . . . Fisher and Seigel fault Dees for using the song after Fisher expressly refused him permission to do so. In their view, this shows bad faith on Dees's part. We cannot agree. Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee. See Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1397 n. 12 (1984). The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought. See 3 *M. Nimmer, supra*, Section 13.05[C], at 13-89; Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum.L.Rev. 1600, 1633 & n. 177. Moreover, to consider Dees blameworthy because he asked permission would penalize him for this modest show of consideration. Even though such gestures are predictably futile, we refuse to discourage them.

Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986)

Appendix N

VI

THE DEFENDANTS DID NOT MISREPRESENT THEIR PARODY AS THE ORIGINAL WORK

The Plaintiff alleges that because reference was made to the original authors "Roy Orbison and William Dees" and to the Plaintiff's copyright interest that "The Defendants have represented to a potential purchaser that they are using the original copyrighted work." (Plaintiff's Memorandum of Law, p.14) This argument is ridiculous. The Defendants submit that a reasonable person would not conclude that the Defendants' parody version was in fact the copyrighted work.

Finally, the Plaintiff alleges that the Defendants' parody competes with the Plaintiff because it precludes the Plaintiff from preparing a rap musical parody version of the original work. (See Plaintiff's Memorandum of Law, p. 29) This argument is ridiculous. The Defendants' submit that if the Court were to accept such argument then no parodist could prepare a derivative work and the Court would be precluded from finding any parody fair use under Section 17, U.S.C. 107 of the Copyright Act.

VII

CONCLUSION

The Defendants have deposited into Court $13,867.56, which constitutes all of the monies owed to the Plaintiff based upon the Defendants' sale of *As Clean As They Wanna Be*, in accordance with the 1976 Copyright Act. The Defendants respectfully assert that these funds are all that the Plaintiff is entitled to.

Appendix N

The Defendants respectfully request this Honorable Court to grant their Motion to Dismiss and to tax costs against the Plaintiff. Finally, the Defendants reiterate their request for oral argument on their Motion to Dismiss.

Respectfully submitted,

s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 4 day of October, 1990.

s/ Alan Mark Turk
ALAN MARK TURK

APPENDIX O — MOTION TO COMPEL PRODUCTION OF DOCUMENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION TO COMPEL
PRODUCTION OF DOCUMENTS

Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, Plaintiff Acuff-Rose Music, Inc. moves this Court for entry of an Order requiring Defendants, LUTHER R. CAMPBELL CHRISTOPHER WONGWON, MARK ROSS, DAVID HOBBS, THE 2 LIVE CREW, and LUKE SKYYWALKER RECORDS, to immediately produce all

documents requested in Plaintiff's First Request for Production of Documents.

Plaintiff would show the Court that:

1. Plaintiff served its First Request for Production of Documents with the Summons and Complaint in the above-styled lawsuit. Owing to difficulty in effecting service, the six defendants were served at different times; however, no later than July 12, 1990, all Defendants were properly served with Plaintiffs' First Request for Production of Documents.

2. Pursuant to Rule 34 of the Federal Rules of Civil Procedure, all Defendants' responses were due no later than August 27, 1990.

3. After receiving no response to the document requests by August 31, 1990, Plaintiff sent a letter to Defendants' counsel calling to his attention the fact that Defendants' responses were out of time and requesting delivery of all of the requested documents no later than September 14, 1990.

4. On September 14, 1990, Plaintiff received a response from Defendants. Defendants produced 14 pages, representing documents responsive to nine of the 85 requests for productions, interposed 26 objections, and responded "none" to 33 requests.

5. On September 25, 1990, Plaintiff wrote to Defendants' counsel specifically setting forth the insufficiencies of the responses and offering to cooperate in setting a time for Defendants to complete their responses.

6. On October 19, 1990, Defendants' counsel by letter stated

that Defendants "at this time, do not intend to supplement their document production" and suggested Plaintiff file a Motion to Compel production.

7. On October 29, 1990, Defendants produced 31 additional pages of documents, and on November 19, 1990, an additional 23 pages. Nothing further has been received or promised.

8. Pursuant to Rule 9(e)(1)(a-c) & (2) of the Local Rules of Court for the United States District Court for the Middle District of Tennessee, Plaintiff has attached as Exhibit I to this Motion the verbatim requests for production that Plaintiff seeks to compel, along with Defendants' responses and Plaintiff's reasons supporting its motion to compel.

9. Pursuant to Rule 9(e)(3) of the Local Rules of Court for the United States District Court for the Middle District of Tennessee, Plaintiff has attached as Exhibit II to this Motion a statement that Plaintiff's counsel has conferred with Defendants' counsel in a good faith effort to resolve by agreement the issues raised and that counsel have not been able to do so.

10. In support of this Motion to Compel, Plaintiff has filed the accompanying Memorandum of Law in Support of Plaintiff's Motion to Compel Production of Documents.

11. Plaintiff moves this Court, pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure, to award the reasonable expenses, including attorneys' fees, incurred by Plaintiff in the preparation and filing of this Motion.

WHEREFORE, Plaintiff requests that Plaintiff's Motion to

Compel Production of Documents be granted and that this Court award such further relief as it deems proper and just.

Respectfully submitted,

KING & BALLOW

s/ Elizabeth B. Marney
E. Andrew Norwood
Elizabeth B. Marney
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue, North
Nashville, Tennessee 37219

Of Counsel:

Hal Willis
ACUFF-ROSE MUSIC, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Compel Production of Documents was duly served this 14 day of December, 1990, by U.S. Mail, postage prepaid, addressed as follows:

Alan M. Turk, Esq.
3310 West End Avenue
Nashville, Tennessee 37203

s/ Elizabeth B. Marney
Elizabeth B. Marney

Appendix O

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS, DEFENDANTS' RESPONSES, AND REASONS SUPPORTING MOTION TO COMPEL

III. SCHEDULE OF DOCUMENTS

1. Each document that relates to "Pretty Woman."

ANSWER: The Plaintiff's request is overly broad in accordance with Rule 26 of the Federal Rules of Civil Procedure as defined in

Appendix O

definition K of the Plaintiff's First Set of Request for Production of Documents. The Defendants have produced all relevant documents concerning "Pretty Women." The Defendants further object to the production of other documents which "relate" to the song "Pretty Women" because said documents are protected under the attorney work product privilege and the attorney-client privilege.

REASON SUPPORTING MOTION: Defendants' objection and claim of privilege have been waived and are inapplicable. *See* Memo at 9-10.[1]

2. Each document that relates to "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents. *See* Memo at 1217.

6. A copy of your source material for your recording of "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with their claim that "Pretty Woman" is a parody of "Oh, Pretty Woman." *See* Memo at 14.

7. A copy of each musical score, musical arrangement, printed

1. This and following references are to the Memorandum of Law in Support of Motion to Compel, filed and served herewith.

sheet music, lead sheet, orchestration, lyric sheet, and recording in any form relating to "Pretty Woman."

ANSWER: No documents exist today. Any documents which may have been utilized in the studio no longer exist.

REASON SUPPORTING MOTION: Defendants' response is incomplete. *See* Memo at 15.

8. A copy of each musical score, musical arrangement, printed sheet music, lead sheet, orchestration, lyric sheet and recording in any form relating to "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with their claim that "Pretty Woman" is a parody of "Oh, Pretty Woman." *See* Memo at 14.

9. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Pretty Woman" was discussed.

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with admission that counsel reviewed and advised Defendants to release "Pretty Woman." *See* Memo at 14-17.

10. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Oh, Pretty Woman" was discussed.

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with admission that counsel reviewed and advised Defendants to release "Pretty Woman." *See* Memo at 14-17.

12. Each document prepared by, for, or at your request or the request of any Defendant or Defendants relating to "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents. *See* Memo at 1417.

13. Each document that relates to promotional material prepared for the album by The 2 Live Crew titled *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with industry practice. *See* Memo at 14-17.

14. Each document that relates to the facts and circumstances surrounding the decision to include "Pretty Woman" on the album *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents. *See* Memo at 14-17.

15. Each document that discusses your use of "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with fair use defense. *See* Memo at 14-17.

16. Documents sufficient to show separately each of the following:

a. the total amount of income you received from the recording of "Pretty Woman";

ANSWER: None.

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents and with practices of the industry. *See* Memo at 14-17.

b. the total amount you paid to produce "Pretty Woman";

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and with practices of the industry. *See* Memo at 14-17.

c. the name, business affiliation, address, telephone number, service performed or product provided, and the amount of the payment for each person or entity that received payment for services or products related to the recording of "Pretty Woman."

ANSWER: None. All of the participants associated with the recording of "Pretty Woman" were employees of the corporate defendant. The studio where "Pretty Woman" was recorded is owned by the corporate Defendant.

REASON SUPPORTING MOTION: Defendants' response is incomplete. *See* Memo at 16-18.

17. Each document that relates to each attempt to create lyrics for "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants response is inconsistent with the parody defense. *See* Memo at 13-17.

20. Each document that relates to the ownership of the copyright for "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with Defendants' other responses and/or produced documents. *See* Memo at 13-17.

21. Each document that relates to the ownership of the copyright for "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with Defendants' other responses and/or produced documents. *See* Memo at 14-18.

Appendix O

28. Each document that relates to each request you made for a license for each song on the album *As Clean As They Wanna Be* from any person.

ANSWER: OBJECTION. The Defendants [sic] request for any license for any song on the album *As Clean As They Wanna Be* is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 6-8, 13, 19.

29. Documents sufficient to show the date of the creation of "Pretty Woman."

ANSWER: Defendants will produce the requested documents.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with Defendant Campbell's affidavit. *See* Memo at 17-19.

32. Documents sufficient to show the date(s) that the album *As Clean As They Wanna Be* was recorded.

ANSWER: OBJECTION. The Defendants have produced documents which evidences when the song "Pretty Woman" was recorded, March 6, 1989. The songs contained on the album *As Clean As They Wanna Be* were recorded on different dates during a several month period. The Defendants object to the production of these documents as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

Appendix O

REASON SUPPORTING MOTION: Objection has been waived. *See* Memo at 7.

34. Documents sufficient to identify by name, business affiliation, address, and telephone number each person involved in writing, recording, producing, manufacturing, or developing "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents and with practices of the industry. *See* Memo at 13-17.

35. Each document used as a source in creating "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with their claim that "Pretty Woman" is a parody. *See* Memo at 14.

37. Each document that relates to the review of "Pretty Woman" by a musicologist, attorney, or any advisor.

ANSWER: OBJECTION. The Defendants object to the production of the requested documents and rely upon the attorney work product privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived and is inapplicable. *See* Memo at 9-11.

38. Each document that relates to or contains a comparison of the music or lyrics of "Pretty Woman" with the music or lyrics of "Oh, Pretty Woman."

Appendix O

ANSWER: OBJECTION. The Defendants object to the production of the requested documents and rely upon the attorney work product privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived and is inapplicable. *See* Memo at 9-12.

39. Documents sufficient to identify Pac Jam Publishing (BMI).

ANSWER: OBJECTION. The Defendants object to the production of the requested documentation as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Defendants' objection has been waived and is inapplicable. *See* Memo at 7.

40. Documents sufficient to identify the Ghetto Style DJ's.

ANSWER: OBJECTION. The Defendants object to the production of the requested documentation as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Defendants' objection has been waived and is inapplicable. *See* Memo at 7.

41. Each document related to all royalties received by you from the sale of *As Clean As They Wanna Be*.

ANSWER: None.

Appendix O

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents and with practices of the industry. *See* Memo at 14.

42. Documents sufficient to show the total income received by you, Luke Skyywalker Records, Luke, Inc., or any other entity from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6, 17.

43. Documents sufficient to show the total income received by you from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6-17.

44. Documents sufficient to show the total income received by Christopher Wongwon from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6, 17.

45. Documents sufficient to show the total income received by Mark Ross from the album *As Clean As They Wanna Be*.

Appendix O

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6, 17.

46. Documents sufficient to show the total income received by David Hobbs from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6, 17.

47. Documents sufficient to show the total income received by each person other than the members of The 2 Live Crew from the album *As Clean As They Wanna Be*.

ANSWER: OBJECTION. The documents requested by the Plaintiff would be very burdensome to produce if not impossible. The Defendants would state that the documents requested are not relevant in accordance with Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. In addition, Defendants' claim of burdensomeness is inconsistent with documents already produced, as well as industry practice. *See* Memo at 7.

48. Documents sufficient to show:

a. the date and destination of each shipment of *As Clean As They Wanna Be;*

Appendix O

ANSWER: OBJECTION. The documents requested by the Plaintiff would be very burdensome to produce if not impossible. The Defendants would state that the documents requested are not relevant in accordance with Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Defendants' objection has been waived and is inapplicable. In addition, Defendants' claim of burdensomeness is inconsistent with documents already produced, as well as industry practice. *See* Memo at 7.

b. the price paid to you for each copy of *As Clean As They Wanna Be;*

ANSWER: See the Record Activity Report which is produced.

REASON SUPPORTING MOTION: Defendants' response is incomplete. *See* Memo at 6.

c. the total number of copies thus far manufactured of *As Clean As They Wanna Be;*

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6.

d. the total number of copies of *As Clean As They Wanna Be* that have been sold, both at the wholesale and retail levels;

ANSWER: The Defendants will produce the requested documents as to the total number of copies of *As Clean As They Wanna Be* at the retail level.

Appendix O

REASON SUPPORTING MOTION: Defendants' response is incomplete and inconsistent with industry practice. *See* Memo at 6.

e. the total dollar amount of income generated by the sale of *As Clean As They Wanna Be;*

ANSWER: The Defendants will produce documents sufficient to show the gross sales of *As Clean As They Wanna Be.*

REASON SUPPORTING MOTION: Defendants' response is incomplete and/or unresponsive. *See* Memo at 6, 17.

49. Copies of all contracts with wholesalers, retailers, distributors and any other sellers or dealers of *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants response is inconsistent with industry practice. *See* Memo at 12-17.

50. Each document that relates to reports sent to or prepared for you regarding the sales of *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents. *See* Memo at 13-14.

51. Documents sufficient to show the total number of copies of *As Clean As They Wanna Be* distributed for promotional purposes.

Appendix O

ANSWER: None.

REASON SUPPORTING MOTION: Defendants response is inconsistent with industry practice. *See* Memo at 13.

52. Documents sufficient to show the retail selling price and the wholesale price of *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants response is inconsistent with industry practice. *See* Memo at 12-17.

56. Contracts, agreements, memoranda, letters and other documents sufficient to show each planned or actual concert or other personal appearance by The 2 Live Crew in Tennessee.

ANSWER: OBJECTION. The Defendant never performed the song "Pretty Woman" in the State of Tennessee. The Plaintiff's request is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and response is incomplete and/or unresponsive. *See* Memo at 7, 15.

57. Contracts, agreements, memoranda, letters and other documents sufficient to show each shipment of musical recordings and other materials by you into Tennessee, including, but not limited to, items such as jackets, T-shirts, posters, caps, and buttons.

Appendix O

ANSWER: OBJECTION. The Defendants do not maintain shipment records on a state by state basis. The Defendants have not utilized the words "Pretty Woman" on any jacket, T-shirt, poster, cap, and/or button. Therefore, the Plaintiff's request is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and response is incomplete and/or unresponsive. *See* Memo at 7, 15-16.

59. A copy of the certificate of incorporation for each corporation in which you hold more than a five percent interest.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 5-8.

60. A copy of any articles of association or partnership to which you are a party or on which your name appears.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 5-8.

Appendix O

61. A copy of each annual report of Luke Skyywalker Records and Luke, Inc. since 1987.

ANSWER: None.

REASON SUPPORTING MOTION: Response is anomalous because contrary to law. *See* Memo at 15.

65. A copy of your tax returns since January 1, 1989, including all attachments.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 7.

66. A copy of all tax returns and attachments for any organization in which you or Luke, Inc. owns more than a five percent interest.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 7.

70. Documents sufficient to show the accounts you or Luke, Inc., or any organization in which you held more than a five percent interest, maintained since July 15, 1989, in any bank, savings institution, mutual account, fund, or trust.

Appendix O

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 7.

71. A copy of each deposit receipt you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and applicable. *See* Memo at 7.

72. Copies of each statement you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 7.

73. Copies of each statement of net worth and listing of assets created in applying for credit or loans which you have completed since July 15, 1989.

Appendix O

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived or is inapplicable, or both. *See* Memo at 7.

74. Copies of correspondence and documents related to any copyright search made regarding "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Response is inconsistent with other documents produced. *See* Memo at 12-17.

75. Each document that discusses ownership of copyright of "Oh, Pretty Woman" or "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: Defendants response is incomplete and inconsistent with Defendants response to request 21, which states that no documents relating to ownership of the copyright for "Oh, Pretty Woman" exist. *See* Memo at 17-19.

76. Documents sufficient to identify each individual who was involved in the performance or production of "Pretty Woman" and his or her respective functions or activities.

Appendix O

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: Defendants' production is incomplete and inconsistent with Defendants' response to request 16(c). *See* Memo at 17-19.

78. Each document related to each instance in which a copyright claim or concern has been raised with regard to any elements of any of your work.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: The objection has been waived and is inapplicable. *See* Memo at 5-8.

80. Each document which relates to your communications with ASCAP or BMI in Nashville, Tennessee; Los Angeles, California; and New York, New York.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: The objection has been waived and is inapplicable. *See* Memo at 7.

81. Each document that contained instructions or related to the manner in which the search for documents requested in this request for production of documents was performed.

Appendix O

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1) - (8) of Instructions . *See* Memo at 1617.

82. Each document consulted in locating or obtaining the documents requested in this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1)-(8) of Instructions. *See* Memo at 16-17.

83. Each document prepared in response to this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1)-(8) of Instructions. *See* Memo at 16-17.

Appendix O

84. Documents sufficient to identify by name, address, and title or job description each person who searched for documents responsive to this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1)-(8) of Instructions. *See* Memo at 16-17.

85. Each document consulted to determine where to search for documents requested in this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1)-(8) of Instructions. *See* Memo at 16-17.

Appendix O

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

DECLARATION OF COUNSEL PURSUANT TO LOCAL RULE 9(E)(3)

Counsel for Plaintiff hereby certify that they have conferred with counsel for Defendants in a good faith effort to resolve by agreement Defendants' insufficient responses to Plaintiff's First Request for Production of Documents and that counsel have not been able to do so.

Appendix O

Respectfully submitted,
KING & BALLOW

s/ Elizabeth B. Marney
Alan L. Marx
E. Andrew Norwood
Elizabeth B. Marney
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue, North
Nashville, Tennessee 37219

Appendix O

APPENDIX O — MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
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ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO COMPEL

Plaintiff, Acuff-Rose Music, Inc. ("Acuff-Rose") submits this Memorandum of Law in Support of its Motion to Compel, pursuant to Rule 8(b) of the local Rules of Court for the U.S. District Court for the Middle District of Tennessee.

Appendix O

Introduction

This action is for willful infringement and commercial exploitation of Plaintiff's copyrighted song "Oh, Pretty Woman" and for interference with Plaintiff's business relationships and prospective business advantage. Defendants filed a Motion to Dismiss on the ground that their preparation of a derivative work based on Plaintiff's song is a parody and, therefore, constitutes a fair use. Plaintiff's Response to the Motion to Dismiss points out that Defendants' work was not a parody and/or that they took too much of Plaintiff's work to justify a finding of fair use. In short, Plaintiff's response demonstrates that as a matter of law Defendants are not entitled to summary disposition of this lawsuit and that the parties vigorously dispute genuine issues of material fact.

By serving Plaintiff's first Request for Production of Documents on Defendants with the Summons and Complaint, Plaintiff attempted to expedite the case by narrowing the issues for trial. The scope of Plaintiff's requests for production of documents is tailored to discover information relating to Defendants' use of "Oh, Pretty Woman" to create a derivative work; relating to the willfulness of Defendants infringement of Plaintiff's music and lyrics; relating to Defendants profits from Defendants' infringement; and relating to Defendants' defense of fair use. Despite the reasonable scope of Plaintiff's requests, to date no substantive discovery has been conducted because Defendants, after unexplained delays, have made incomplete, inconsistent, and inadequate responses to Plaintiff's requests.

Instead of full and forthright responses to Plaintiff's requests for production, Defendants belatedly produced 14 pages, which represent documents responsive to only nine of Plaintiff's 85

Appendix O

requests. Well over a month after producing these 14 pages, Defendants sent Plaintiff 31 additional sheets, which contained such duplicative or fragmentary information that rendered the supplementary production of little use. Again, on November 19, 1990, Defendants produced 23 additional sheets that were only partially responsive.

Thus, some six months after Plaintiff initiated discovery in this lawsuit, Defendants have produced very few documents useful to the resolution of the issues in this lawsuit. Moreover, Defendants' failure to cooperate in discovery is compounded by their unexplained delays in responding in the first place and by their refusal to produce documents responsive to the issue that they themselves raised, *viz.* their claim that the infringing song is a parody. By agreement, the parties set April 1, 1991, as the cut-off date for all discovery. Plaintiff is faced with attempting to complete preparation for additional discovery in the next four months without full access to Defendants' documents. Defendants' refusal to produce documents responsive to Plaintiff's requests has prejudiced and will continue to prejudice Plaintiff by unnecessarily interfering with the expeditious and economical resolution of this lawsuit.

All efforts by Plaintiff's counsel to resolve this matter by conferring with Defendants' counsel have been unsuccessful.

Facts

On July 18, 1990, Plaintiff filed the above-referenced action against Defendants LUTHER R. CAMPBELL, CHRISTOPHER WONGWON, MARK ROSS, DAVID HOBBS, THE 2 LIVE CREW, and LUKE SKYYWALKER RECORDS. Plaintiff served its First Request for Production of Documents on all six

Defendants simultaneously with the Summons and Complaint (Exhibit A). Three Defendants were served on June 19, 20, & 22, 1990. No later than July 12, 1990, the remaining three Defendants were properly served with process and with Plaintiff's request for production (Exhibit B).

At the latest, pursuant to Rule 34 of the Federal Rules of Civil Procedure, all responses to Plaintiff's requests were due to be produced on or before August 27, 1990.[1] Receiving no documents or any other response to the request for production by August 31, 1990, Plaintiff sent Defendants' counsel a letter calling to his attention that Defendants were out of time and requesting delivery of all of the requested documents no later than September 14, 1990. (Exhibit C).

On September 14, 1990, Plaintiff received a response to the document requests, consisting of 14 pages, representing documents responsive to nine of the 85 requests. Defendants interposed objections to 26 requests and responded "None" to 33 requests. (Exhibit D).

On September 25, 1990, Plaintiff wrote to Defendants' counsel specifically setting forth the insufficiencies of the responses and offering to cooperate in setting a time for Defendants to complete and/or supplement their production (Exhibit E). Defendants responded to this offer by stating that "at this time, [Defendants] do not intend to supplement their document production" and suggesting that Plaintiff file a Motion to Compel (Exhibit F). Nevertheless, on October 29, 1990, Defendants produced supplemental documents, consisting of 31 pages, and on

1. In fact, the responses of Defendant Wongwon were due on August 3, 1990, and of Defendants Luke Skyywalker Records and Campbell on August 6, 1990.

November 19, 1990, 23 additional documents. No additional responses have been received or promised.

Although more than four months have elapsed since all defendants were served with these document requests, Defendants' responses are still incomplete.

Argument

I. Defendants' Objections to Plaintiff's First Request for Production of Documents are Waived And Meritless.

A. Waiver

Failure to make a timely response to discovery waives any objections the tardy party might otherwise have had. *Fretz v. Keltner,* 109 F.R.D. 303, 309 (D. Kan. 1985) (Failure to answer or object in a timely manner constitutes a waiver of the right to object, including objections based on privilege); *accord Davis v. Fendler,* 650 F.2d 1154, 1160 (9th Cir. 1981) (failure to timely object waives any objection, even privileged information). *See also,* 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2173 (1970) (failure to make timely objections constitutes a waiver).

In the instant case, Defendants' failure to respond to Plaintiff's request for documents on or before August 27, 1990, fully 45 days after service on all Defendants was effected, constituted a waiver of any objections.[2] Accordingly, Defendants

2. Counsel for Defendants apparently claim that Plaintiff granted an extension of time in the August 31, 1990, letter. However, neither Plaintiff's letter nor any conversation between Plaintiff's and Defendants' Counsel supports this erroneous

(Cont'd)

should be ordered to produce all documents responsive to the 26 requests to which they have belatedly interposed objections based on privilege and relevancy.

1. Relevancy

Even if Defendants had not waived all objections by responding belatedly to Plaintiff's discovery, Defendants' objections grounded on relevancy are without merit. Defendants cannot seriously maintain that Plaintiff's requests for documents relating to the album containing the infringing song are irrelevant. Indeed, Defendants have themselves admitted the relevance of requests relating to the album rather than just to the song "Pretty Woman" by agreeing to respond to requests 42, 43, 44, 45, 46, 48(b)(c)(d) & (e), & 53. Having agreed to produce the documents and having failed to object to these requests, Defendants cannot selectively and unilaterally decide that other requests relating to the album are irrelevant. The party resisting discovery has the burden of showing that the discovering party's requests are objectionable. *See United States v. 58.16 Acres of Land Etc.*, 66 F.R.D. 570, (E.D. Ill. 1975) (the burden is on the objecting party to show specifically why request is improper). Because Defendants have conceded that requests relating to the album are relevant, Defendants should produce all documents responsive to requests 28, 32, 39, 40, 47, 48(a), 56, 57 & 80.

(Cont'd)

claim. First, the language of the letter clearly states that Plaintiff will "forgo filing a Motion to Compel" the "overdue discovery" if Defendants will agree to "retrieve all of the requested documents" no later than September 14. The phrases "overdue discovery" and "all of the requested documents" are unambiguous conditions and leave no room for misunderstanding. Plaintiff did not grant Defendants an extension of time to object. Rather, Plaintiff, in a good faith attempt to avoid a discovery dispute, simply reminded Defendants that they were out of time.

Discovery of documents relating to licenses sought for the songs on the album (28), to the dates that the album was recorded (32), to the identities of entities listed on the album label (39 & 40), to the total income the album generated (47 & 57), to where the album was distributed (48(a)), and to public performances of the copyrighted songs on the album (80) is directly relevant to a determination of Defendants' willfulness in infringing Plaintiff's work and to computation of profits resulting from the infringement. Moreover, Plaintiff is entitled to sufficient factual information relating to the creation, sales, and distribution of the album to compute for itself the revenues generated by the infringement.

Defendants also purport to object to requests for tax returns (65 & 66) and for bank records (70, 71, 72, 73) on the ground of relevancy. It is clear that Defendants cannot shield from discovery reasonable inquiries into the revenues generated by the infringement or Defendants' financial status where substantial damages are sought.

Because all Defendants' objections are waived by being out of time and are meritless, Defendants should be ordered to produce all documents withheld on the ground of relevancy.

2. Privilege

Defendants' withholding of other relevant documents on the ground that these documents are privileged is also without merit. Even if Defendants' untimely response to Plaintiff's document request had not waived all objections based on either the attorney client privilege or the work-product doctrine, *see Fretz v. Keltner*, 109 F.R.D. 303, 309 (D. Kan. 1985), Defendants' reliance on the advice of counsel to justify infringement constitutes a waiver of all

information relating to the subject matter of that advice. *Coleco Industries v. Universal City Studios,* 110 F.R.D. 688, 691 (S.D.N.Y. 1986); *In re Sealed Case,* 676 F.2d 793, 818 (D.C. Cir. 1982).

Defendants interpose objections to six requests based on both the attorney-client privilege and the work-product doctrine and to two requests based on solely the work-product doctrine. As the following shows, these assertions of privilege are waived and inapplicable.

Defendants attached Luther Campbell's affidavit to their Motion to Dismiss (Exhibit G). Paragraph six of Luther Campbell's affidavit states: "That all correspondence referenced above [Defendants' letter requesting permission to do a "parody" and Plaintiff's letter refusing] was sent to my legal counsel, Allen L. Jacobi who advised me that since the song was a parody that [sic] it could be released if so desired." This statement is clear in one respect: it purports to assert that Defendants are not guilty of copyright infringement because legal counsel told them so. This assertion constitutes a defense based on reliance on advice of counsel that, as a matter of law, makes document requests 1, 37, & 38 open to full discovery. *See generally Coleco Industries v. Universal City Studios,* 110 F.R.D. 688, 691 (S.D.N.Y. 1986) (selective disclosure of work product to establish the basis for an opinion of counsel constitutes an implied waiver of all work product relevant to the same issue). *See also N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.,* 117 F.R.D. 83 (M.D.N.C. 1987) (the primary exception to the work-product protection arises when a party raises an issue involving reliance on the attorney's advice).

Document requests 37 & 38 ask for documents relating to reviews of "Pretty Woman" by a musicologist, attorney, or any

advisor and relating to comparisons of "Pretty Woman" and "Oh, Pretty Woman." Mr. Campbell's affidavit affirms that the release of "Pretty Woman" was pursuant to advice of counsel that the song was a parody. The linchpin of Defendants' Motion to Dismiss is this purported defense. To permit Defendants to withhold documents responsive to requests 37 & 38 would allow use of the work-product doctrine as both a sword and a shield. On the one hand, Defendants will be affirmatively raising the defense of counsel's advice and, on the other hand, selectively disclosing only those portions of counsel's advice that protect them. Defendants should be ordered to produce the material that they themselves have made the linchpin of their defense against infringement.

To justify their denial of production of documents relating to "Pretty Woman," Defendants object to document request number one on the grounds of both the work-product doctrine and the attorney client privilege.[3] Defendants object to document request number one on the grounds of both the work-product doctrine and the attorney-client privilege. As with the claim of work-product, Defendants have waived any privilege relating to the advice that counsel gave regarding the subject matter of parody. *See In re Sealed Case,* 676 F.2d 793, 818 (D.C. Cir. 1982) ("When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter. . . ."). *See also, Smith v. Alyeska Pipeline Service Company,* 538 F. Supp. 977, 979 (D. Del. 1982) *Aff'd mem.*, 758 F.2d 668 (1984), *cert. denied,* 471 U.S. 1066, 105 S. Ct. 2142 (1985) (It would be unfair to allow a client to assert the attorney-client privilege and prevent disclosure

3. Defendants also object that the request is overly broad. However, a discovery request relating to information about the particular infringing work in a copyright lawsuit is proper.

of damaging communications while allowing the client to disclose other selected communications solely for self-serving purposes.")

Accordingly, because Defendants' objections are untimely and because Defendants have waived their right to assert a objection based on the work-product doctrine and/or the attorney-client privilege, Defendants should be ordered to produce all documents responsive to requests 1, 37 & 38.

Plaintiff has substantial need for the requested information, which is unavailable from any other source. *See* Fed. R. Civ. P. 26(b)(3). In a lawsuit charging an infringement of Plaintiffs' work by Defendants' work where Defendants rely on the nature of the work as a defense, the relevancy of documents relating to the infringing work, to reviews of the work, and to comparisons of the work to Plaintiff's work is beyond dispute. Moreover, Defendants are the only practicable source for the facts contained in the requested documents. *See generally Eckert v. Fitzgerald,* 119 F.R.D. 297 (D.C. Cir. 1988) (Even if documents containing attorneys' notes had not been waived, no alternative source of the substantially equivalent information required compelled production.)

Documents responsive to requests 1, 37 & 38 are essential to clarify the chronological confusion created by Defendants' limited production and Defendant Campbell's affidavit. Defendant Campbell's affidavit calls into question the version of chronology contained in Defendants' responses. In paragraph 1 of Part I of his affidavit, Mr. Campbell states that he created "Pretty Woman" in May, 1989, and in part II, paragraphs 1 and 2, Mr. Campbell avers that the General Manager of Luke Records requested and was denied permission to use "Oh, Pretty Woman" on July 5 and 17, 1989, respectively. This chronology is consistent with Mr.

Campbell's concluding statement that after the July 5 and 17 exchange of correspondence he obtained advice that because his song was a parody, "it could be released if so desired."

However, the excerpted and fragmentary Record Activity Report Defendants produced (*See* attachments to Exhibit F) shows clearly that sales of the album containing "Pretty Woman" were occurring in June, 1989, before either their July 5 request to use Plaintiff's song and Plaintiff's July 17 refusal or counsel's advice. In addition, two duplicate recording studio track sheets that Defendants produced (*See* attachments to Exhibit F) show that Defendants recorded "Pretty Woman" on March 6, 1989, before Campbell claims he "created" the work.

The inconsistencies in Defendants' version of the chronology show the need for a complete response. If Defendants recorded and released the album containing the infringing song before asking Plaintiff's permission or even obtaining advice of counsel, this fact calls into question Defendants' good faith and Defendant Campbell's sworn version of the chronology. The need to produce all documents responsive to requests 1, 37, & 38 is beyond dispute. Plaintiff has a right to know unequivocally when the song was created and when it was recorded. Moreover, Plaintiff is entitled to know whether Defendants created, recorded, distributed, and marketed the album containing the infringing song before asking for Plaintiff's permission and counsel's advice or after taking these measures.

II. Defendants' Categorical Denials of Access and Incomplete Responses Are Inappropriate.

Defendants respond to 33 of Plaintiff's requests for documents with the word "None." The claim that Defendants have

no responsive documents to so many requests both is inconsistent with the limited production Defendants have made and stretches credulity.

For example, Defendants have produced only summary documents relating to sales reports and none relating to promotional distribution of *As Clean as They Wanna Be* (50 & 51). Similarly, it is inconceivable that an album was marketed with no promotional material prepared for the album (13) and no transactional documents relating to sales and distribution of the album (49). If such work was done by a third party, Plaintiff is entitled to documents that show the identity and role of this third party. Likewise, documents relating to the music, lyrics, and ownership of "Pretty Woman" (17, 18, 20 & 33) and to public performances of the song (31) must exist. In fact, Defendants November 19, 1990, production contains a document indicating that the Defendants might have improperly claimed an ownership interest in "Pretty Woman."

Equally troubling are Defendants categorical responses of "None" to requests for documents relating to the total income from recording "Pretty Woman" and to the amount paid to produce the song (16(a) & (b)), documents that must exist and that must be readily available. Defendants also assert that they can produce no documents responsive to request 34, which asks for information sufficient to identify persons involved in writing, recording, producing, manufacturing, or developing "Pretty Woman." Most certainly, this information must be available in view of Defendant Campbell's affidavit averring that he created "Pretty Woman." Additionally, there must be records showing payment to musicians, arrangers, engineers and other costs incurred in producing the song, or, if payments were made by a third party, correspondence or notations concerning the third party's role.

Other inconsistencies are evident from Defendants categorical responses of "None" to requests asking for royalties from sales of the album (41), for reports of sales of the album (50), and for average profits from album sales (54 & 55). Because Defendants have produced excerpts of Record Activity Reports that contain units and dollar amounts of sales of the album, a categorical "None" in response to requests 41, 54, & 55 is misleading. Furthermore, Defendants' response of "None" to Plaintiff's request for documents evidencing sources for "Pretty Woman" (35) is wholly illogical and inconsistent with their insistence in their Motion to Dismiss that their song is a parody. By definition, parodies have sources.

Other troubling uses of the blanket "None" include responses to requests 6, 8, 12, 14, & 15. Categorical claims were made that no documents exist relating to source material for Defendants' recording of "Pretty Woman," to the music and lyrics of "Oh, Pretty Woman," to documents prepared by, for, or at Defendants' request relating to "Oh, Pretty Woman," to the decision to include "Pretty Woman" on the album, to the use of "Oh, Pretty Woman," and to sources used in creating "Pretty Woman." These responses cannot be accurate in view of Defendants' insistence that their song is a parody of "Oh, Pretty Woman" and that they released the song only after counsel so advised them.

Defendants' claim that no documents exist responsive to Plaintiff's request for annual reports of the corporate Defendant for the past three years (61) is anomalous in view of the statutory requirement of the State of Florida that corporations file such annual reports. *See* Fla. Stat. § 607.357 (attached as Exhibit H).

Defendants' responses to requests 7, 56, & 57 for production are incomplete or inadequate, or both. Defendants' explanation for

not producing documents responsive to Plaintiff's request for musical scores, arrangements, sheet music, lead sheet, orchestration, lyric sheet, and recording relating to "Pretty Woman" (7) is that "no documents exist today. Any documents — *which may have been utilized in the studio no longer exist.*" (emphasis added). This explanation is unsatisfactory and raises more questions than it answers. The request is not limited to documents used in the studio.

Similarly, in response to Plaintiff's request for documents sufficient to show each planned or actual concert or other personal appearance of the 2 Live Crew in Tennessee (56), Defendants explain that "The Defendant never performed the song 'Pretty Woman' in the state of Tennessee," and then purport to interpose a relevancy objection. The request designated *planned* as well as actual concert or personal performance in Tennessee. Notwithstanding the invalidity of the interposed objection, it signals that documents responsive to the request may well exist. Defendants should be ordered to produce all responsive documents.

Moreover, Defendants should be ordered to produce all documents responsive to request 57, which asks for documents evidencing all shipments of musical recordings and other materials into Tennessee. Defendants' response that they "do not maintain shipment records on a state by state basis" is inconsistent with their supplemental production of sheets captioned Accounts Receivable Distributor Listing (Detailed), which shows distribution of something to various countries and states. In view of this computer generated production, Plaintiff can only conclude that Defendants have additional documentary information or data in a computer memory or on disk responsive to request 57. Defendants should produce these documents.

Likewise, Defendants' explanation that there are no documents responsive to request 16(c), which asks for the identities and roles of and payment to those who participated in the recording of "Pretty Woman," is non-responsive. The scope of Plaintiff's request is not limited to participants outside the "corporate defendant" but asks for information relating to "each person on entity" who participated in the recording of the song. Because Defendants' response clearly shows that the requested information is available, Defendants should produce it.

Finally, Defendants' staccato objection based on the work-product and attorney-client privileges that documents responsive to requests 81-85, which deal generally with how the search for documents was conducted, is not responsive to the requests. Defendants have failed to identify the nature and date of the documents, who authored them and to whom they were sent, and the reason for the claimed privilege. This information is especially necessary in this case where Defendants' production has been so incomplete.

III. Defendants Have Failed to Produce all Responsive Documents.

Although Defendants agreed to produce documents responsive to some 19 requests, the produced documents address some, but not all, of the 19 requests. For example, apparently in response to Plaintiff's requests for production of documents sufficient to show the total income received by all Defendants and the gross sales from the album *As Clean As They Wanna Be* (42, 43, 44, 45, 46, & 48(e)), Defendants produced excerpts from a document captioned Record Activity Report for Period 6/27/89 to 9/13/90. The produced portions consist of two partial sheets, numbered "p. 2 and p. 3," and purport to contain records of sales of

the album (*See* attachments to Exhibit F). Over 45 days later, Defendants produced 4 additional sheets captioned Record Activity Report — Detail for Period 1/1/90 to 6/30/90. As the caption indicates, the scope of activity period for the supplemental production is shorter by nine months than for the original production. Defendants should be ordered to produce in its entirety the Record Activity Report — Detail for the period from June 27, 1989 to September 13, 1990. In addition, the fragmentary production gives Plaintiff no way to determine for itself that these six sheets represent the total sales of the album. Furthermore, these six sheets do not contain accounts of any additional income that Defendants' infringing use generated. The relevancy of Defendants' total income and profits is clear in a lawsuit requesting relief under, *inter alia*, 17 U.S.C. 504(a)(1).

Defendants agreed to produce documents relating to the creation and recording of "Pretty Woman," but Defendants produced only duplicate track sheets containing the recording date "3/6/89." The discrepancy between Defendant Campbell's affidavit, which states that he created "Pretty Woman" in June, 1989, and the recording date on these duplicate sheets requires that Defendants produce documents sufficient to show unequivocally the dates the song was created and recorded.

Another example of insufficient production is in response to requests for documents showing the identities and roles of each individual involved in the production of "Pretty Woman" (76). Although Defendants agree to produce the requested documents, none has been produced. Furthermore, Defendants' insistence that no responsive documents relating to copyright ownership for "Oh, Pretty Woman" (21) and to the identities of and payment to each person or entity involved in the recording of "Pretty Woman" (16(c)) exist is inconsistent with the limited numbers of documents already produced.

IV. Defendants Should be Ordered to Pay the Reasonable Expenses, Including Attorney's Fees, Incurred by Plaintiff in Moving to Compel Discovery.

Rule 37(a)(4) provides for the allowance of expenses and attorney's fees incurred by the moving party in the preparation and filing of a Rule 37 motion to compel discovery. Rule 37 states in pertinent part:

> (4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(4).

The language of this rule is clear that where a motion is granted the court shall award expenses, including attorneys' fees to the moving party. The Court should award Acuff-Rose the costs incurred in preparing this motion to compel necessitated by Defendants' unjustified opposition to discovery. *H. K. Porter v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1124-25 (6th Cir. 1976).

In view of the paucity of production and multiplicity of unmeritorious and/or waived objections, any opposition to this

Appendix O

motion to compel would not be justified, and no other circumstances exist to make an award of expenses unjust.

Conclusion

For the foregoing reasons, the court should grant Plaintiff's Motion to Compel Productions of Documents.

Respectfully submitted,
KING & BALLOW
s/ Elizabeth B. Marney
Alan L. Marx
E. Andrew Norwood
Elizabeth B. Marney
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue, North
Nashville, Tennessee 37219

Of Counsel:

Hal Willis
ACUFF-ROSE MUSIC, INC.

Appendix O

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Compel was duly served this 14 day of December, 1990, by U.S. Mail, postage prepaid, addressed as follows:

Alan M. Turk, Esq.
3310 West End Avenue
Nashville, Tennessee 37203

s/ Elizabeth B. Marney
Elizabeth B. Marney

Appendix O

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3-90-0524
JURY DEMAND
Judge Wiseman

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT THE 2 LIVE CREW

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff Acuff-Rose Music, Inc. hereby requests that the Defendant, The 2 Live Crew, produce the documents and things designated below for inspection and copying at the offices of King

Appendix O

& Ballow, 1200 Noel Place, 200 Fourth Avenue North, Nashville, Tennessee, at 10:00 a.m. no later than 30 days after receipt of service of the Summons and Complaint in this action if the Court so orders.

I. DEFINITIONS

As used herein —

A. "You" or "your" means and refers to the Defendant, The 2 Live Crew.

B. "Skyywalker Records" means and refers to the Defendant, Skyywalker Records, its present and former officers, directors, employees, partners, members, agents, and other persons, including attorneys, acting on their behalf, and each affiliated company or business entity and their present and former officers, directors, employees, partners, members, agents, and other persons, including attorneys that act on behalf of Skyywalker Records.

C. "The 2 Live Crew" means and refers to Defendants Luther Campbell, Christopher Wongwon, Mark Ross, David Hobbs, individually, and as the vocal group The 2 Live Crew.

D. "Acuff-Rose Music, Inc." means and refers to Plaintiff Acuff-Rose Music, Inc., its present and former officers, directors, employees, partners, members, agents, and other persons, including attorneys, acting on its behalf.

E. "Defendants" means the defendants in the lawsuit filed in the U.S. District Court for the Middle District of Tennessee, styled *Acuff-Rose Music, Inc. v. Luther Campbell, et al.*

Appendix O

F. "Person" means any natural person, artificial person, corporation, firm, company, sole proprietorship, partnership, joint venture, limited partnership, business association or other entity having legal existence.

G. "Document" means and relates to any written, printed, typed, recorded, taped, or other graphic matter of any kind fixed in any tangible medium of expression, which is in your possession, care, custody or control, including copies that contain information that differs from the original through marginalia, annotation, emphasis, or deletion. This definition includes documents with respect to which you may assert any privilege.

H. "Communications" means and relates to each transmission of information by oral, graphic, written, pictorial, or otherwise perceptible means, including, but not limited to, telephone conversations, letters, documents, memoranda, telegrams, facsimile transmissions, meetings, and personal conversations.

I. "Oh, Pretty Woman" means and relates to each version of the copyrighted work that is alleged to have been infringed in the Complaint in *Acuff-Rose Music, Inc. v. Luther Campbell, et al.*

J. "Pretty Woman" refers to that version or any variation thereof of the song entitled "Pretty Woman" performed by The 2 Live Crew and contained on the album *As Clean As They Wanna Be*, including but not limited to any music, lyrics, notes, videos, preparatory documents, masters, outtakes, and any other materials used in connection with the creation or production of this song. This definition also includes each preliminary draft of any of the above.

Appendix O

K. "Relates to" means constitutes, contains, records, discusses, summarizes, analyzes, discloses, or refers to, in whole or in part.

L. "Including" means including but not limited to.

M. "And" and "or" shall be construed either conjunctively or disjunctively as necessary to bring within the scope of this document request any information or document that might otherwise be construed to be outside its scope.

N. References to the plural shall include the singular; references to the singular shall include the plural.

O. References to the feminine shall include the masculine; references to the masculine shall include the feminine.

II. INSTRUCTIONS

A. Unless otherwise stated, the period covered by this request for production is the period between July 15, 1988, and the date you receive this request, but this time specifically does not alter your obligations under Federal Rule of Civil Procedure 26(e) and Local Rule 9 of the Middle District of Tennessee seasonably to supplement your responses.

B. For each document for which you assert a claim of privilege, provide the following information:

1. the name of the author;

2. the name of the person to whom the document was addressed or sent;

Appendix O

3. the name of each person other than the author and recipient who has seen the document;

4. the date shown on the document and the date the document was created, if different;

5. the number of pages in the document;

6. a brief statement of the subject matter;

7. the nature of the privilege being asserted; and

8. the number of the paragraph of this request to which the document is otherwise responsive.

III. SCHEDULE OF DOCUMENTS

1. Each document that relates to "Pretty Woman."

2. Each document that relates to "Oh, Pretty Woman."

3. Each document that you sent to Acuff-Rose Music, Inc., relating to either "Pretty Woman" or "Oh, Pretty Woman."

4. Each document that you received from Acuff-Rose Music, Inc., relating to either "Pretty Woman" or "Oh, Pretty Woman."

5. A copy of each recorded version of "Pretty Woman."

6. A copy of your source material for your recording of "Pretty Woman."

7. A copy of each musical score, musical arrangement,

Appendix O

printed sheet music, lead sheet, orchestration, lyric sheet, and recording in any form relating to "Pretty Woman."

8. A copy of each musical score, musical arrangement, printed sheet music, lead sheet, orchestration, lyric sheet and recording in any form relating to "Oh, Pretty Woman."

9. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Pretty Woman" was discussed.

10. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Oh, Pretty Woman" was discussed.

11. Each document prepared by, for, or at your request, or the request of any Defendant or Defendants relating to any recording of "Pretty Woman."

12. Each document prepared by, for, or at your request or the request of any Defendant or Defendants relating to "Oh, Pretty Woman."

13. Each document that relates to promotional material prepared for the album by The 2 Live Crew titled *As Clean As They Wanna Be*.

14. Each document that relates to the facts and circumstances surrounding the decision to include "Pretty Woman" on the album *As Clean As They Wanna Be*.

15. Each document that discusses your use of "Oh, Pretty Woman."

Appendix O

16. Documents sufficient to show separately each of the following:

a. the total amount of income you received from the recording of "Pretty Woman";

b. the total amount you paid to produce "Pretty Woman";

c. the name, business affiliation, address, telephone number, service performed or product provided, and the amount of the payment for each person or entity that received payment for services or products related to the recording of "Pretty Woman."

17. Each document that relates to each attempt to create lyrics for "Pretty Woman."

18. Each document that relates to each attempt to create music for "Pretty Woman."

19. Each document that relates to each communication between you and any of the Defendants and between the Defendants and any other persons, concerning the actual, proposed, or possible use of the music and lyrics of "Oh, Pretty Woman."

20. Each document that relates to the ownership of the copyright for "Pretty Woman."

21. Each document that relates to the ownership of the copyright for "Oh, Pretty Woman."

22. Each document that relates to each communication with Acuff-Rose Music, Inc., concerning the actual, proposed, or

Appendix O

possible use of the music, lyrics or other copyrighted elements of "Oh, Pretty Woman."

23. Each document that relates to each communication between you and any other person concerning the actual, proposed, or possible use of the music, lyrics, or other copyrighted elements of "Oh, Pretty Woman."

24. Each document that relates to the rejection by Acuff-Rose Music, Inc., or any other person, of your request to use the lyrics, music, or other copyrighted elements of "Oh, Pretty Woman."

25. Each document that relates to each communication between you and Acuff-Rose Music, Inc., relating to the actual, proposed, or possible preparation of a derivative work of "Oh, Pretty Woman."

26. Each document that relates to each communication between you and any person relating to the actual, proposed, or possible preparation of a derivative work of "Oh, Pretty Woman."

27. Each document that relates to each communication with Acuff-Rose Music, Inc., or any other person, for a license for the use of "Oh, Pretty Woman" on the album *As Clean As They Wanna Be*, or any other use.

28. Each document that relates to each request you made for a license for each song on the album *As Clean As They Wanna Be* from any person.

29. Documents sufficient to show the date of the creation of "Pretty Woman."

Appendix O

30. Documents sufficient to show the date of the recording of "Pretty Woman."

31. Documents sufficient to identify each time and place "Pretty Woman" was performed publicly.

32. Documents sufficient to show the date(s) that the album *As Clean As They Wanna Be* was recorded.

33. Each document that relates to music, lyrics, or concepts proposed or considered for *As Clean As They Wanna Be*.

34. Documents sufficient to identify by name, business affiliation, address, and telephone number each person involved in writing, recording, producing, manufacturing, or developing "Pretty Woman."

35. Each document used as a source in creating "Pretty Woman."

36. Each document that relates to each alternative version of "Pretty Woman."

37. Each document that relates to the review of "Pretty Woman" by a musicologist, attorney, or any advisor.

38. Each document that relates to or contains a comparison of the music or lyrics of "Pretty Woman" with the music or lyrics of "Oh, Pretty Woman."

39. Documents sufficient to identify Pac Jam Publishing (BMI).

Appendix O

40. Documents sufficient to identify the Ghetto Style DJ's.

41. Each document related to all royalties received by you from the sale of *As Clean As They Wanna Be*.

42. Documents sufficient to show the total income received by you, Luke Skyywalker Records, Luke, Inc., or any other entity from the album *As Clean As They Wanna Be*.

43. Documents sufficient to show the total income received by you from the album *As Clean As They Wanna Be*.

44. Documents sufficient to show the total income received by Christopher Wongwon from the album *As Clean As They Wanna Be*.

45. Documents sufficient to show the total income received by Mark Ross from the album *As Clean As They Wanna Be*.

46. Documents sufficient to show the total income received by David Hobbs from the album *As Clean As They Wanna Be*.

47. Documents sufficient to show the total income received by each person other than the members of The 2 Live Crew from the album *As Clean As They Wanna Be*.

48. Documents sufficient to show:

a. the date and destination of each shipment of *As Clean As They Wanna Be;*

b. the price paid to you for each copy of *As Clean As They Wanna Be;*

c. the total number of copies thus far manufactured of *As Clean As They Wanna Be;*

d. the total number of copies of *As Clean As They Wanna Be* that have been sold, both at the wholesale and retail levels;

e. the total dollar amount of income generated by the sale of *As Clean As They Wanna Be*.

49. Copies of all contracts with wholesalers, retailers, distributors and any other sellers or dealers of *As Clean As They Wanna Be*.

50. Each document that relates to reports sent to or prepared for you regarding the sales of *As Clean As They Wanna Be*.

51. Documents sufficient to show the total number of copies of *As Clean As They Wanna Be* distributed for promotional purposes.

52. Documents sufficient to show the retail selling price and the wholesale price of *As Clean As They Wanna Be*.

53. Each document that relates to payment of mechanical or other royalties regarding the sales of *As Clean As They Wanna Be*.

54. Documents sufficient to show your average profit per copy of *As Clean As They Wanna Be*.

55. Documents sufficient to show your average profit per month on the sale of *As Clean As They Wanna Be* for each month since the release of *As Clean As They Wanna Be*, including any advance sales.

56. Contracts, agreements, memoranda, letters and other documents sufficient to show each planned or actual concert or other personal appearance by The 2 Live Crew in Tennessee.

57. Contracts, agreements, memoranda, letters and other documents sufficient to show each shipment of musical recordings and other materials by you into Tennessee, including, but not limited to, items such as jackets, T-shirts, posters, caps, and buttons.

58. A copy of the certificate of incorporation for Luke Skyywalker Records and Luke, Inc.

59. A copy of the certificate of incorporation for each corporation in which you hold more than a five percent interest.

60. A copy of any articles of association or partnership to which you are a party or on which your name appears.

61. A copy of each annual report of Luke Skyywalker Records and Luke, Inc. since 1987.

62. Each document related to any subsidiaries of Luke Skyywalker Records or Luke, Inc.

63. A copy of each annual report for any entity in which you or Luke, Inc. owns more than a five percent interest.

64. A copy of Luke Skyywalker Records' most recent audited financial report.

65. A copy of your tax returns since January 1, 1989, including all attachments.

Appendix O

66. A copy of all tax returns and attachments for any organization in which you or Luke, Inc. owns more than a five percent interest.

67. Documents sufficient to show your policy, practice, or procedure in retaining or discarding documents.

68. Each document related to your retention or destruction of any documents.

69. Documents sufficient to show the full names, mailing, business, and residence addresses and phone numbers of you, Luke, Inc., Christopher Wongwon, Mark Ross, and David Hobbs.

70. Documents sufficient to show the accounts you or Luke, Inc., or any organization in which you held more than a five percent interest, maintained since July 15, 1989, in any bank, savings institution, mutual account, fund, or trust.

71. A copy of each deposit receipt you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989 .

72. Copies of each statement you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

73. Copies of each statement of net worth and listing of assets created in applying for credit or loans which you have completed since July 15, 1989.

74. Copies of correspondence and documents related to any copyright search made regarding "Oh, Pretty Woman."

Appendix O

75. Each document that discusses ownership of copyright of "Oh, Pretty Woman" or "Pretty Woman."

76. Documents sufficient to identify each individual who was involved in the performance or production of "Pretty Woman" and his or her respective functions or activities.

77. Each document that discusses the use of sampling or any other mechanical technique for the production of "Pretty Woman."

78. Each document related to each instance in which a copyright claim or concern has been raised with regard to any elements of any of your work.

79. Each document you sent to or received from any person related to "Pretty Woman."

80. Each document which relates to your communications with ASCAP or BMI in Nashville, Tennessee; Los Angeles, California; and New York, New York.

81. Each document that contained instructions or related to the manner in which the search for documents requested in this request for production of documents was performed.

82. Each document consulted in locating or obtaining the documents requested in this request for production of documents.

83. Each document prepared in response to this request for production of documents.

84. Documents sufficient to identify by name, address, and title or job description each person who searched for documents

responsive to this request for production of documents.

85. Each document consulted to determine where to search for documents requested in this request for production of documents.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served with the initial process, including Summons and Complaint, upon the following:

Bruce S. Rogow, Esq.
Professor of Law
Nova University Law Center
Nova University
Fort Lauderdale, Florida 33314

Luther R. Campbell, a/k/a Luke Skyywalker
3050 Biscayne Boulevard
Miami, Florida 33137

Christopher Wongwon, a/k/a Fresh Kid Ice
13165 North West 11th Avenue
Miami, Florida 33168

Mark Ross, a/k/a Brother Marquis
3050 Biscayne Boulevard
Miami, Florida 33137

David Hobbs, a/k/a Mr. Mixx
3050 Biscayne Boulevard
Miami, Florida 33137

The 2 Live Crew
3050 Biscayne Boulevard
Miami, Florida 33137

Luke Skyywalker Records
3050 Biscayne Boulevard
Miami, Florida 33137

s/ Elizabeth B. Marney

Appendix O

EXHIBIT B

KING & BALLOW
LAW OFFICES
1200 NOEL PLACE
200 FOURTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219

TELEPHONE: 615/259-3456
TELECOPY: 615/254-7907

July 12, 1990

HAND DELIVERED

Alan Turk, Esq.
3310 West End Avenue
Nashville, TN 37203

Re: Acuff-Rose v. Luther R. Campbell et al.

Dear Alan:

Pursuant to your representation that you will accept service on behalf of all defendants in the referenced lawsuit, please find enclosed the Summons, Complaint, and Plaintiff's First Request for Production of Documents for Mark Ross, David Hobbs, and The 2-Live Crew.

Sincerely,

s/ Betty Marney
Elizabeth B. Marney

EBM/am
Enclosures

Appendix O

EXHIBIT C

KING & BALLOW
LAW OFFICES
1200 NOEL PLACE
200 FOURTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219

TELEPHONE: 615/259-3456
TELECOPY: 615/254-7907

August 31, 1990

VIA FACSIMILE

Alan Turk, Esq.
3310 West End Avenue
Nashville, TN 37203

Re: Acuff-Rose, Inc. v. The Two Live Crew
Dear Alan:

Since I have been unable to reach you today, I am writing in regard to your overdue discovery in the referenced lawsuit.

Our client is understandably anxious to have the documents we requested. However, we understand your logistical difficulties and are willing to work with you.

To that end, we will be willing to forgo filing a Motion to Compel for the present if you will send us a letter stating that you will retrieve all of the requested documents from your client and

Appendix O

deliver them to us no later than Friday, September 14, 1990.

If you are unable to agree to this offer or to meet this timetable, please let us know immediately so that we can discuss this matter. If we cannot come to an understanding, we will be forced to file a Motion to Compel Production.

Therefore, please advise us of your decision by the end of business Tuesday, September 4, 1990.

Sincerely,

s/ Andy Norwood
E. Andrew Norwood

EBM/tt

Appendix O

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

1. Each document that relates to "Pretty Woman."

ANSWER: OBJECTION. The Plaintiff's request is overly broad in accordance with Rule 26 of the Federal Rules of Civil

Appendix O

Procedure as defined in definition K of the Plaintiff's First Set of Request for Production of Documents. The Defendants have produced all relevant documents concerning "Pretty Woman." The Defendants further object to the production of other documents which "relate" to the song "Pretty Woman" because said documents are protected under the attorney work product privilege and the attorney-client privilege.

2. Each document that relates to "Oh, Pretty Woman."

ANSWER: None.

3. Each document that you sent to Acuff-Rose Music, Inc., relating to either "Pretty Woman" or "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

4. Each document that you received from Acuff-Rose Music, Inc., relating to either "Pretty Woman" or "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

5. A copy of each recorded version of "Pretty Woman."

ANSWER: The Defendants will produce a requested copy.

6. A copy of your source material for your recording of "Pretty Woman."

ANSWER: None.

7. A copy of each musical score, musical arrangement, printed sheet music, lead sheet, orchestration, lyric sheet, and recording in

Appendix O

any form relating to "Pretty Woman."

ANSWER: No documents exist today. Any documents which may have been utilized in the studio no longer exist.

8. A copy of each musical score, musical arrangement, printed sheet music, lead sheet, orchestration, lyric sheet and recording in any form relating to "Oh, Pretty Woman."

ANSWER: None.

9. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Pretty Woman" was discussed.

ANSWER: None.

10. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Oh, Pretty Woman" was discussed.

ANSWER: None.

11. Each document prepared by, for; or at your request, or the request of any Defendant or Defendants relating to any recording of "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

12. Each document prepared by, for, or at your request, or the request of any Defendant or Defendants, relating to "Oh, Pretty Woman."

Appendix O

ANSWER: None.

13. Each document that relates to promotional material prepared for the album by The 2 Live Crew titled *As Clean As They Wanna Be*.

ANSWER: None.

14. Each document that relates to the facts and circumstances surrounding the decision to include "Pretty Woman" on the album *As Clean As They Wanna Be*.

ANSWER: None.

15. Each document that discusses your use of "Oh, Pretty Woman."

ANSWER: None.

16. Documents sufficient to show separately each of the following:

a. the total amount of income you received from the recording of "Pretty Woman."

ANSWER: None.

b. the total amount you paid to produce "Pretty Woman";

ANSWER: None.

c. the name, business affiliation, address, telephone number, service performed or product provided, and the amount of the

Appendix O

payment for each person or entity that received payment for services or products related to the recording of "Pretty Woman".

ANSWER: None. All of the participants associated with the recording of "Pretty Woman" were employees of the corporate defendant. The studio where "Pretty Woman" was recorded is owned by the corporate Defendant.

17. Each document that relates to each attempt to create lyrics for "Pretty Woman".

ANSWER: None.

18. Each document that relates to each attempt to create music for "Pretty Woman."

ANSWER: None.

19. Each document that relates to each communication between you and any of the Defendants and between the Defendants and any other persons, concerning the actual, proposed, or possible use of the music and lyrics of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

20. Each document that relates to the ownership of the copyright for "Pretty Woman."

ANSWER: None.

21. Each document that relates to the ownership of the copyright for "Oh, Pretty Woman."

Appendix O

ANSWER: None.

22. Each document that relates to each communication with Acuff-Rose Music, Inc., concerning the actual, proposed, or possible use of the music, lyrics, or other copyrighted elements of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

23. Each document that relates to each communication between you and any other person concerning the actual, proposed, or possible use of the music, lyrics, or other copyrighted elements of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

24. Each document that relates to the rejection by Acuff-Rose Music, Inc., or any other person, of your request to use the lyrics, music, or other copyrighted elements of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

25. Each document that relates to each communication between you and Acuff-Rose, Music, Inc., relating to the actual, proposed, or possible preparation of a derivative work of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

26. Each document that relates to each communication between you and any person relating to the actual, proposed, or possible preparation of a derivative work of "Oh, Pretty Woman."

Appendix O

ANSWER: The Defendants will produce the requested documents.

27. Each document that relates to each communication with Acuff-Rose Music, Inc., or any other person, for a license for the use of "Oh, Pretty Woman" on the album *As Clean As They Wanna Be*, or any other use.

ANSWER: The Defendants will produce the requested documents.

28. Each document that relates to each request you made for a license for each song on the album *As Clean As They Wanna Be* from any person.

ANSWER: OBJECTION. The Defendants request for any license for any song on the album *As Clean As They Wanna Be* is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

29. Documents sufficient to show the date of the creation of "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

30. Documents sufficient to show the date of the recording of "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

31. Documents sufficient to identify each time and place "Pretty Woman" was performed publicly.

ANSWER: None.

Appendix O

32. Documents sufficient to show the date(s) that the album *As Clean As They Wanna Be* was recorded.

ANSWER: OBJECTION. The Defendants have produced documents which evidences when the song "Pretty Woman" was recorded, March 6, 1989. The songs contained on the album *As Clean As They Wanna Be* were recorded on different dates during a several month period. The Defendants object to the production of these documents as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

33. Each document that relates to music, lyrics, or concepts proposed or considered for *As Clean As They Wanna Be*.

ANSWER: None.

34. Documents sufficient to identify by name, business affiliation, address, and telephone number each person involved in writing, recording, producing, manufacturing, or developing "Pretty Woman."

ANSWER: None.

35. Each document used as a source in creating "Pretty Woman."

ANSWER: None.

36. Each document that relates to each alternative version of "Pretty Woman."

ANSWER: None.

Appendix O

37. Each document that relates to the review of "Pretty Woman" by a musicologist, attorney, or any advisor.

ANSWER: OBJECTION. The Defendants object to the production of the requested documents and rely upon the attorney work product privilege.

38. Each document that relates to or contains a comparison of the music or lyrics of "Pretty Woman" with the music or lyrics of "Oh, Pretty Woman."

ANSWER: OBJECTION. The Defendants object to the production of the requested documents and rely upon the attorney work product privilege.

39. Documents sufficient to identify Pac Jam Publishing (BMI).

ANSWER: OBJECTION. The Defendants object to the production of the requested documentation as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

40. Documents sufficient to identify the Ghetto Style DJ's.

ANSWER: OBJECTION. The Defendants object to the production of the requested documentation as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

41. Each document related to all royalties received by you from the sale of *As Clean As They Wanna Be*.

ANSWER: None.

Appendix O

42. Documents sufficient to show the total income received by you, Luke Skyywalker Records, Luke, Inc., or any other entity from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

43. Documents sufficient to show the total income received by you from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

44. Documents sufficient to show the total income received by Christopher Wongwon from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

45. Documents sufficient to show the total income received by Mark Ross from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

46. Documents sufficient to show the total income received by David Hobbs from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

47. Documents sufficient to show the total income received by each person other than the members of The 2 Live Crew from the album *As Clean As They Wanna Be*.

ANSWER: OBJECTION. The documents requested by the Plaintiff would be very burdensome to produce if not impossible.

Appendix O

The Defendants would state that the documents requested are not relevant in accordance with Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

48. Documents sufficient to show:

a. the date and destination of each shipment of *As Clean As They Wanna Be;*

ANSWER: OBJECTION. The documents requested by the Plaintiff would be very burdensome to produce if not impossible. The Defendants would state that the documents requested are not relevant in accordance with Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

b. the price paid to you for each copy of *As Clean As They Wanna Be;*

ANSWER: See the Record Activity Report which is produced.

c. the total number of copies thus far manufactured of *As Clean As They Wanna Be;*

ANSWER: The Defendants will produce the requested documents.

d. the total number of copies of *As Clean As They Wanna Be* that have been sold, both at the wholesale and retail levels;

ANSWER: The Defendants will produce the requested documents as to the total number of copies of *As Clean As They Wanna Be* sold at the wholesale level. The Defendants do not have any documents

evidencing the sale of *As Clean As They Wanna Be* at the retail level.

e. the total dollar amount of income generated by the sale of *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce documents sufficient to show the gross sales of *As Clean As They Wanna Be*.

49. Copies of all contracts with wholesalers, retailers, distributors and any other sellers or dealers of *As Clean As They Wanna Be*.

ANSWER: None.

50. Each document that relates to reports sent to or prepared for you regarding the sales of *As Clean As They Wanna Be*.

ANSWER: None.

51. Documents sufficient to show the total number of copies of *As Clean As They Wanna Be* distributed for promotional purposes.

ANSWER: None.

52. Documents sufficient to show the retail selling price and the wholesale price of *As Clean As They Wanna Be*.

ANSWER: None.

53. Each document that relates to payment of mechanical or other royalties regarding the sales of *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

54. Documents sufficient to show your average profit per copy of *As Clean As They Wanna Be*.

ANSWER: None.

55. Documents sufficient to show your average profit per month on the sale of *As Clean As They Wanna Be* for each month since the release of *As Clean As They Wanna Be*, including any advance sales.

ANSWER: None.

56. Contracts, agreements, memoranda, letters and other documents sufficient to show each planned or actual concert or other personal appearance of The 2 Live Crew in Tennessee.

ANSWER: OBJECTION. The Defendant never performed the song "Pretty Woman" in the State of Tennessee. The Plaintiff's request is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

57. Contracts, agreements, memoranda, letters and other documents sufficient to show each shipment of musical recordings and other materials by you into Tennessee, including, but not limited to, items such as jackets, T-shirts, posters, caps, and buttons.

ANSWER: OBJECTION. The Defendants do not maintain shipment records on a state by state basis. The Defendants have not utilized the words "Pretty Woman" on any jacket, T-shirt, poster, cap, and/or button. Therefore, the Plaintiff's request is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

Appendix O

58. A copy of the certificate of incorporation for Luke Skyywalker Records and Luke, Inc.

ANSWER: The Defendants will produce the requested documents.

59. A copy of the certificate of incorporation for each corporation in which you hold more than a five percent interest.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

60. A copy of any articles of association or partnership to which you are a party or on which your name appears.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

61. A copy of each annual report of Luke Skyywalker Records and Luke, Inc., since 1987.

ANSWER: None.

62. Each document related to any subsidiaries of Luke Skyywalker Records or Luke, Inc.

ANSWER: None.

63. A copy of each annual report for any entity in which you or Luke, Inc. owns more than a five percent interest.

Appendix O

ANSWER: None.

64. A copy of Luke Skyywalker Records' most recent audited financial report.

ANSWER: None.

65. A copy of your tax returns since January 1, 1989, including all attachments.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

66. A copy of all tax returns and attachments for any organization in which you or Luke, Inc. owns more than a five percent interest.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

67. Documents sufficient to show your policy, practice, or procedure in retaining or discarding documents.

ANSWER: None.

68. Each document related to your retention or destruction of any documents.

ANSWER: None.

Appendix O

69. Documents sufficient to show the full names, mailing, business, and residence addresses and phone number of you, Luke, Inc., Christopher Wongwon, Mark Ross, and David Hobbs.

ANSWER: The Defendants will produce the requested documents.

70. Documents sufficient to show the accounts you or Luke, Inc., or any organization in which you held more than a five percent interest, maintained since July 15, 1989, in any bank savings institution, mutual account, fund, or trust.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

71. A copy of each deposit receipt you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

72. Copies of each statement you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

Appendix O

73. Copies of each statement of net worth and listing of assets created in applying for credit or loans which you have completed since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

74. Copies of correspondence and documents related to any copyright search made regarding "Oh, Pretty Woman."

ANSWER: None.

75. Each document that discusses ownership of copyright of "Oh, Pretty Woman" or "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

76. Documents sufficient to identify each individual who was involved in the performance or production of "Pretty Woman" and his or her respective functions or activities.

ANSWER: The Defendants will produce the requested documents.

77. Each document that discusses the use of sampling or any other mechanical technique for the production of "Pretty Woman."

ANSWER: None.

78. Each document related to each instance in which a copyright claim or concern has been raised with regard to any elements of any of your work.

Appendix O

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

79. Each document you sent to or received from any person related to "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

80. Each document which relates to your communications with ASCAP or BMI in Nashville, Tennessee; Los Angeles, California; and New York, New York.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

81. Each document that contained instructions or related to the manner in which the search for documents requested in this request for production of documents was performed.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

82. Each document consulted in locating or obtaining the documents requested in this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

Appendix O

83. Each document prepared in response to this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

84. Documents sufficient to identify by name, address, and title or job description each person who searched for documents responsive to this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

85. Each document consulted to determine where to search for documents requested in this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

Respectfully submitted,

s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

Appendix O

CERTIFICATE OF SERVI CE

I hereby certify that the original Answers to Request for Production of Documents was mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 14th day of September, 1990.

s/ Alan Mark Turk
ALAN MARK TURK

Appendix O

EXHIBIT — RECORD ACTIVITY REPORT

(Omitted Here But Submitted Separately As Lodging)

Appendix O

July 5, 1989

GARY TEIFER
Opryland, USA
P.O. Box 121900
Nashville, TN 37312-1900

RE: "Pretty Woman"

Dear Mr. Teifer:

As the General Manager of Skyywalker Records, I would like to inform you of "Two Live Crew's" desire to do a parody on the above captioned song.

In the event you have not heard of this group, they are one of the most successful rap groups in the country today. This LP will be their third release and the previous two have gone Gold and are close to Platinum.

At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain to what Weird Al Yankovic and other satirical artists are doing.

We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a

Appendix O

novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Sincerely,

Linda Fine
General Manager

Encl.
(cassette/lyric sheet)

Appendix O

ACUFF-ROSE MUSIC, INC.
MILEXS MUSIC, INC.

VIA FAX AND MAIL

May 23, 1990

Jeanne Ramdin
CMRRA
36 Wellesley St. West
Suite 320
Toronto, Ontario MSS 2S4

RE: "OH PRETTY WOMAN" — License number 9007-03518

Dear Joanne:

We are refusing the attached license due to the unauthorized version of the lyric used on this song by the artists '2 Live Crew'.

Permission was not granted to create new lyrics on this composition.

If you have any questions, or need addition information, please feel free to contact me directly.

Sincerely,
s/ Julie Allmand
Julie Allmand
Copyright Dept.
Opryland Music Group, Inc.

cc: Peggy Lamb/Copyright
Jerry Flowers/Dir. of Pub.
Hal Willis/Legal

Appendix O

WEA
Music of Canada, Ltd,
A Warner Communications Company

Warner/Elektra/Atlantic

May 28, 1990

Ms. Peggy Lamb, Copyright Dep't.
Opryland Music Group
65 Music Square, West
Nashville, Tn.
37203.

Dear Peggy:

Re: "Oh Pretty Woman"

Further to last week's conversation concerning the use of "Oh Pretty Woman" by the group 2 Live Crew, WEA Music of Canada proposes to pay all royalties due on the song to CMRRA for sales to the end of June, 1990, along with any money in reserve. This payment will take place in the usual manner, on August 15. We will then, subject to the approval of Skyywalker Records, remove the song from the album.

As far as liability on inventory is concerned, I suggest that we wait until after the June quarterly payment has been made before assessing an amount, as we expect to see returns by then.

A copy of this letter to Skyywalker Records will serve as our request for their authorization to take the song off of the 2 Live Crew album. If you are in agreement with our proposal, please

Appendix O

advise me in writing by June 15, so that we can make preparations for the September quarter.

Sincerely,
s/ Jim Agnew
Jim Agnew
Royalty Manager

cc: Stan Kulin
Dave Tollington
Bruce Mattavish
Luther Campbell
Milton Rothman

Appendix O

WEA
Music of Canada, Ltd.
A Warner Communications Company
Warner/Elektra/Atlantic

May 28, 1990

REGISTERED MAIL

Mr. Luther Campbell
c/o Skyywalker Records
3050 Biscayne Blvd., Suite 307
Liberty City, Fla.
U.S.A.
33137

Dear Luther:

Re: "Oh Pretty Woman"

Enclosed are copies of Opryland Publishing's letter to CMRRA, along with our response, concerning the use of the song "Oh Pretty Woman" on the 2 Live Crew album.

Pursuant to Paragraph 21 of our agreement, WEA Music of Canada intends to remove the song from the album "As Clean as they Wanna Be", effective with all units manufactured as of July 1, 1990.

Please indicate your approval by signing below and returning this letter to me by June 19, 1990. Should you have any questions, please contact me as soon as possible.

Appendix O

Sincerely,
s/ James E. Agnew
James E. Agnew
Royalty Manager

ACCEPTED AND AGREED

_____
Skyywalker Records

DATE: _____

cc: Stan Kulin
Dave Tollington
Bruce Mactavish
Milton Rothman

Appendix O

OPRYLAND
MUSIC GROUP
ACUFF-ROSE MUSIC, INC.
MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,
s/ Gerry Teifer
Gerry Teifer

GT/jmn

Appendix O

EXHIBIT — 2 LIVE CREW TRACK CHART FOR PRETTY WOMAN

(Omitted Here But Submitted Separately As Lodging)

Appendix O

1. David Hobbs
   16401 N.E. Second Avenue
   Miami, Florida 33162
   Phone: (305) 381-1974

2. Mark Ross
   14330 N.W. 13th Avenue
   Miami, Florida 33167
   Phone: (305) 769-0667

3. Christopher Wongwon
   13161 N.W. 11th Street
   Miami, Florida 33168
   Phone: (305) 687-7205

4. Luther Campbell
   7180 N. Oakmont Drive
   Miami, Florida 33138
   Phone: (305) 757-2041

Appendix O

State of Florida

Department of State

I certify that the attached is a true and correct copy of the Articles of Amendment, filed on June 29, 1990, to Articles of Incorportion for SKYYWALKER RECORDS, INC., changing its name to LUKE RECORDS, INC., a Florida corporation, as shown by the records of this office.

The document number of this corportion is M34847.

Given under my hand and the
Great Seal of the State of Florida,
at Tallahassee, the Capital, this the
2nd Day of July, 1990.

Jim Smith
Secretary of State

[seal]
Grant Seal of the State of Florida
In God We Trust

Appendix O

[stamped]
FILED
1990 JUNE 29 AM 11:08
SECRETARY OF STATE
TALLAHASSEE, FLORIDA

SKYYWALKER RECORDS, INC.
ARTICLES OF AMENDMENT

Pursuant to Florida Statutes, Chapter 607.187, the Articles of Incorporation of the above-named corporation are hereby amended as follows:

1. Article I is hereby amended to read as follows:

"The name of this corporation shall be:

"Luke Records, Inc."

2. The foregoing Amendment was adopted by the sole Director and sole Shareholder of this corporation by execution of that certain "Written Statement Manifesting Intention that Amendment to Articles of Incorporation of Skyywalker Records, Inc. be Adopted", pursuant to Florida Statutes Section 607.181(3) on the 20th day of June, 1990.

3. This Amendment is effective upon the Secretary of State's office approval of this amendment.

IN WITNESS WHEREOF, the undersigned President and Secretary of this corporation have executed these Articles of Amendment, this 20th day of, June 1990.

Appendix O

s/ Luther Campbell
Luther Campbell, President and
Secretary of Skyywalker Records,
Inc.

Appendix O

SKYYWALKER RECORDS, INC.
WRITTEN STATEMENT MANIFESTING INTENTION THAT AMENDMENT
TO
ARTICLES OF INCORPORATION BE ADOPTED
ADOPTED ON JUNE 20, 1990

The undersigned, being the sole Director and Shareholder of the above-named Florida corporation, eligible to vote, hereby declares, pursuant to Florida Statutes Section 607.181(3), his intention that the following amendment to the Articles of Incorporation be and is adopted:

Article I is hereby amended to read as follows:

The name of this corporation shall be:

"Luke Records, Inc."

IN WITNESS WHEREOF, the undersigned sole Director and Shareholder of this corporation has executed this Statement Manifesting Intention that Amendment to Articles of Incorporation of Skyywalker Records, Inc. be adopted this 20th day of June, 1990.

s/ Luther Campbell
Luther Campbell, Sole Director
and Sole Shareholder

JW/sgs
Lukerec. smt

Appendix O

STATE OF FLORIDA
COUNTY OF DADE

The foregoing Articles of Amendment of Skyywalker Records, Inc. were acknowledged before me this 20th day of June, 1990 by Luther Campbell, President and Secretary of Skyywalker Records, Inc. a Florida corporation, on behalf of the corporation.

[stamped]
Notary Public State of Florida

My Commission Expires:

[stamped]
Notary Public State of Florida
My Commission Expires Oct. 9, 1992
Bonded Thru Bankers Ins. Ca.

Appendix O

EXHIBIT E

KING & BALLOW
LAW OFFICES
1200 NOEL PLACE
200 FOURTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219
TELEPHONE: 615/259-3456
TELECOPY: 615/254-7907

September 25, 1990

HAND DELIVERED

Alan Turk, Esq.
3310 West End Avenue
Nashville, Tennessee 37203

Re: *Acuff-Rose v. Luther Campbell, et al.*

Dear Alan:

We received Defendants' Response to Plaintiff's First Request for Production of Documents in the referenced lawsuit on Friday, September 14, 1990. Quite frankly, we were disappointed.

On review, we determined that Defendants have produced a total of 14 pages, which represent documents for only nine of the 85 requests for production. In addition to the scant responses to Acuff-Rose's requests, Defendants have interposed objections that either have been waived or are inapplicable.

As an initial matter, all of Defendants' responses to Acuff-

Appendix O

Rose's requests, which were served with the Complaint, were untimely. Because Defendants have failed to timely respond to Acuff-Rose's requests, they have waived the right to object. Please produce all documents responsive to any request where an objection has been interposed. Specifically, please produce documents responsive to requests 1, 37, 38, 81, 82, 83, 84, and 85. In addition, Defendants have not produced documents containing unprivileged information. Both the rules and the clear instructions in part II, B, 1-8 of the request require production of this information.

In addition to waiver of any attorney-client privilege because of untimeliness, Defendants' reliance on advice of legal counsel in Luther Campbell's affidavit attached to the Motion to Dismiss exposes, as a matter of law, all information based on the parody defense arising out of the attorney-client relationship to discovery. Plaintiff is entitled to the information responsive to requests 1, 37, and 38.

These untimely objections also make blanket assertions of the work product doctrine, which has either been waived or is inapplicable or both. For example, Luther Campbell's waiver of the attorney-client privilege also waives any claim of work product protection. In addition, Defendants are not entitled to rely on the attorney work product doctrine to protect information arising out of the review of "Pretty Woman" by someone acting as a musicologist. *See* requests 37 & 38. Accordingly, Acuff-Rose is entitled to production of any and all documents relating to such review.

Further, Defendants assert that materials related to *As Clean As They Wanna Be* are irrelevant. Documents pertaining to the album that contained the infringing work are clearly relevant to this action.

Appendix O

Defendants deny production of some 34 of Acuff-Rose's requests for documents on the ground that no responsive documents exist. The fact that Defendants have produced documents relating to "Oh, Pretty Woman" is inconsistent with the claim that there are no documents responsible to requests 2, 12, 14, 15, & 21. Another inconsistency is the response to request 6, which says there was no source material for "Pretty Woman," even though Defendants claim that the song is a "parody." By definition, parodies have sources.

In addition to these obvious inconsistencies, Defendants have asserted that no responsive documents exist relating to promotional material prepared for *As Clean as They Wanna Be* (13). It is inconceivable that an album was marketed with no documents relating to the music and lyrics (17, 18, & 33), relating to Defendants' ownership of "Pretty Woman" (20), relating to copyright registration (21), and relating to public performances of the song (31).

Another insufficiency is evident where Defendants offer to produce documents that were in fact not provided. If there are additional documents to be produced, please produce them immediately. If, on the other hand, you assert that all responsive documents have been produced, we note that the responses to requests 5, 26, 29, & 30 state that Defendants will produce the documents, but documents responsive to these requests were not provided. These documents should be produced.

Finally, Florida statute § 607.357 requires corporations to file annual reports. Pursuant to Request 61, Acuff-Rose is entitled to production of these documents.

The foregoing examples are merely illustrative rather than

Appendix O

exhaustive and show that Defendants' responses to Acuff-Rose's request for production are inadequate and that Defendants remain obligated to respond fully and completely. Toward this end, we will be willing to work with you to set a time to complete Defendants' responses. Please call us to discuss this matter. It has been 49 days since discovery was due. Prompt completion of discovery is necessary to expedite the progress of this lawsuit.

Sincerely,
s/ Betty
Elizabeth B. Marney

EBM/tt

Appendix O

EXHIBIT F

ALAN MARK TURK ATTORNEY, P.C.
3310 WEST END AVE.
FOURTH FLOOR
NASHVILLE, TENNESSEE 37203

FAXPHONE

October 19, 1990

Elizabeth B. Marney
KING & BALLOW
1200 Noel Place
200 Fourth Avenue, North
Nashville, TN 37219

Re: *Acuff-Rose v. The 2 Live Crew, et al.*

Dear Elizabeth:

Please be advised that I am mailing to you today the proposed Scheduling Order signed by myself on behalf of Alan Jacobi and Sanford Ross. I anticipated that the defendants would also require two days for trial. In addition, please be advised that the defendants agree that this matter should not be submitted to a Magistrate.

Further, please be advised that the defendants, at this time, do not intend to supplement their document production. If you feel it necessary, then I suggest that you file Motion to Compel.

If you have any questions concerning the proposed Pre-Trial Order or the defendants' position concerning your request for a supplemental production please do not hesitate to contact me.

Appendix O

Very truly yours,
s/Alan
ALAN MARK TURK

AMT/wb

Enclosure

Appendix O

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 052
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF DADE)

PART I

COMES NOW the Affiant and makes oath as follows:

Appendix O

1. My name is Luther Campbell, and I am a citizen and resident of the State of Florida. I am over the age of eighteen (18) years of age.

2. In May, 1989, I wrote a parody of the song "Oh Pretty Woman" which I entitled "Pretty Woman". In writing the parody I felt it was necessary for the listener to identify the parody version with the original version written and performed by the late Roy Orbison. In writing the lyrics to the parody and selecting the accompanying *score* it was a critical factor that I determine what amount of the original work would be included in the parody. I chose to include the distinctive introduction of the original version of "Oh, Pretty Woman" and the first line of lyrics because I felt this was sufficient for the listeners to identify the parody with the original work.

3. The parody "Pretty Woman" was an attempt on my part, through comical lyrics, to satirize the original work "Oh, Pretty Woman", written and performed by Mr. Orbison.

PART II

1. On July 5, 1989, Linda Fine, General Manager of Luke Records f/k/a Luke Skyywalker Records, wrote Gerry [Gary]. Teifer of Opryland U.S.A., Inc., and Acuff-Rose Music, Inc. Attached as Exhibit A to my Affidavit is a copy of that correspondence. The purpose of Ms. Fine's letter was to advise Acuff-Rose Music, Inc. of the intent of The 2 Live Crew to write and perform a parody of the song "Oh, Pretty Woman" originally written and performed by Roy Orbison, for which Acuff-Rose Music, Inc. held the copyright. Ms. Fine enclosed with her correspondence "a copy of the lyrics, so that you may see their satirical parody, very similar in vein to what Wierd Al Yankovic

Appendix O

and other satirical artists are doing". (Exhibit A) Ms. Fine indicated that Acuff-Rose Music, Inc. would be acknowledge as the owner of the song and that the Defendants would pay the statutory rate for its use. Ms. Fine also indicated that the parody would be included on a novelty record and that it would be "heard by hundreds of thousands of new listeners in their homes". (Exhibit A)

2. On July 17, 1989, Gerry Teifer, of the Opryland Music Group, Inc. and Acuff-Rose, Music, Inc., wrote Linda Fine, General Manager of Luke Records, formerly known as Luke Skyywalker Records. Attached as Exhibit B is a copy of that correspondence. Mr. Teifer, as agent for the Plaintiff, indicated that "I must inform you that we cannot permit the use of a parody of "Oh Pretty Woman". (Exhibit B)

4. In June, 1989, Luke Records, formerly known as Skyywalker Records, released "As Clean As They Want to Be" which included "Pretty Woman" the parody of "Oh Pretty Woman" referenced in Ms. Fine's correspondence attached hereto as Exhibit A.

5. The Defendants did acknowledge Acuff-Rose Music, Inc.'s ownership interest in the song and the authorship of Mr. Orbison and Mr. Dees. Attached as Exhibit C is a photocopy of the compact disc cover which acknowledges these rights of the Plaintiff. "As Clean As They Want To Be" had moderate success in the market place, with combined sales of 248,000 units of albums, cassettes and compact discs. The Plaintiff, as the copyright owner of "Oh Pretty Woman" is entitled to be compensated the statutory rate for the combined sales of albums, cassettes and compact discs. An accounting has been performed by Luke Records, formerly known as Luke Skyywalker Records, to determine the amount of

Appendix O

money owed to the Plaintiff. This amount is $13,867.56. Attached as Exhibit D to my affidavit is a photocopy of a check made payable to the Plaintiff in the amount of $13,867.56 to compensate the Plaintiff for the combined sales of "As Clean As They Want To Be" for the inclusion of the parody "Pretty Woman". This check has been tendered to the Plaintiff through the United States District Court for the Middle District of Tennessee as was originally offered in Ms. Fine's correspondence dated July 5, 1989 (Exhibit A).

6. That all correspondence referenced above was sent to my legal counsel, Allen L. Jacobi who advised me that since the song was a parody that it could be released if so desired.

Further the Affiant sayeth not.

s/Luther Campbell
LUTHER CAMPBELL

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 31 DAY OF JULY, 1990.

s/Melanie I. Kerr
NOTARY PUBLIC, State of Florida

Appendix O

EXHIBIT H

§ 607.354 CORPORATIONS & BUSINESS TRUSTS Title 34

Note 10

nonqualified corporation, its successors or assigns. Tornado Southern, Inc. v. Harry's Auto Parts, Inc., App., 222 So.2d 29 (1969).

Bankruptcy trustee acquires title to estate by operation of law, and is not a "successor or assign" within former § 613.04 prohibiting suit by successor or assign of nonqualified foreign corporation. Id.

II. Pleading

The defense raising question of foreign corporation's right to maintain a suit in the state should be specifically made. Ronnoc Grove Co. v. Coe-Mortimer Co., 83 Fla. 370, 91 So. 265 (1922); Farrell v. Forest Inv. Co., 73 Fla. 191, 74 So. 216, 1 A.L.R. 25 (1917).

Under federal rule relating to pleading of affirmance defenses, failure to comply with § 613.04 (see, now, this section) must be affirmatively pleaded. Norman M. Morris Corp. v. Weinstein, C.A., 466 F.2d 137 (1972).

Mere allegation that citizen of Florida assigned mortgage to foreign corporation which failed to file copy of charter in state was insufficient to show corporation's disqualification to maintain foreclosure suit. McMullen v. Inland Realty Corporation, 113 Fla. 476, 152 So. 740 (1934).

Appendix O

Compliance with the provisions of predecessor to this section is not a condition precedent to the right of a corporation to maintain an action in the courts of this state, but the defense of failure to comply is one that should be specially pleaded. O'Daniel v. Kulosa, 97 Fla. 269, 120 So. 357 (1929).

Plea that plaintiff had not complied with Florida foreign corporation law was demurrable, where it did not aver that plaintiff was not doing business in state when the statute was enacted. Holder Turpentine Co. v. M.C. Kiser Co., 68 Fla. 312, 67 So. 85 (1915).

12. Mandamus

Verification of petition and proof of compliance with § 613.04 (see, now, this section) as to right to do business within the state were sufficient to show right of plaintiffs to bring petition for mandamus. City of Miami Beach v. Jonathon Corp., App., 238 So.2d 516 (1970).

13. Review

Error, if any, in entering judgment in bar against foreign corporation which sued on note executed in state, rather than judgment abating action until corporation should comply with this section, was invited, where corporation's counsel prepared judgment order, hence corporation could not take advantage thereof. Reliance Fertilizer Co. v. Davis, 124 Fla. 859, 169 So. 579 (1936).

607.357 Annual report of domestic and foreign corporations

(1) Each domestic corporation and each foreign corporation

Appendix O

authorized to transact business in this state shall file with the Department of State, on or after January 1 and on or before July 1 of each year, a sworn report on such forms as the Department of State shall prescribe setting forth:

(a) The name of the corporation and the state or country of incorporation.

(b) The date of incorporation or, if a foreign corporation, the date on which it was admitted to do business in this state.

(c) The street address of the principal office of the corporation.

(d) The corporation's federal employer identification number.

(e) The name and street address of each officer.

(f) The name and mailing address of each director.

(g) The name and street address of the registered agent upon whom service of process may be made.

(h) Such additional information as may be necessary or appropriate to enable the Department of State to carry out the provisions of this chapter.

(2) Proof to the satisfaction of the Department of State that on or before July 1 such report was deposited in the United States mail in a sealed envelope, properly addressed with postage prepaid, shall be deemed a compliance with this requirement.

(3) If the Department of State finds that such report conforms to the requirements of this chapter, it shall file the same. If the Department of State finds that such report does not so conform, it shall promptly return the same to the corporation for any necessary corrections, in which event the penalties hereinafter prescribed for failure to file such report within the time hereinabove provided shall not apply if such report is corrected to conform with the requirement of this chapter and returned to the Department of State within 30 days from the date on which it was mailed to the corporation by the Department of State.

(4) Each report shall be executed by the corporation by its president, vice president, secretary, assistant secretary, or treasurer or, if the corporation is in the hands of a receiver or trustee, it shall be executed on behalf of the corporation by such receiver or trustee, and the signing thereof shall have the same legal effect as if made under oath, without the necessity of appending such oath thereto.

(5) The information required to be shown on each annual report shall be determined as of December 31 immediately preceding the annual report due date.

(6) Any corporation failing to file the annual report required by this section shall not be permitted to maintain or defend any action in any court of this state until such report is filed and all taxes due under this chapter are paid, and any corporation failing to file the annual report shall be subject to dissolution or cancellation of its certificate of authority to do business as provided in this chapter.

APPENDIX O — DEFENDANTS' RESPONSE TO THE PLAINTIFF'S MOTION TO COMPEL FILED JANUARY 16, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' RESPONSE TO THE PLAINTIFF'S MOTION TO COMPEL

Comes now the Defendants, by and through their attorneys, and in response to the Plaintiff's Motion to Compel would state that the Plaintiff's Motion to Compel has been rendered moot by the Court's Order of January 14, 1991. This Court has granted the

Appendix O

Defendants' Motion for Summary Judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure. The Court has held that the Defendants' song "Pretty Woman" is a parody of the Plaintiff's song "Oh, Pretty Woman" and that said parody constitutes fair use under Section 107 of the Copyright Act. The Court has further held that Section 106 of the copyright Act, as a matter of law, precludes the tort claims alleged by the Plaintiff. The Court in its Memorandum Opinion did not address whether or not the funds deposited by the Defendants satisfy their statutory obligation to the Plaintiff.

The Defendants have provided to the Plaintiff documents evidencing the number of copies of *As Clean As They Wanna Be* that were sold. The Defendants have deposited with the Court sufficient funds to satisfy their statutory obligation to the Plaintiff. The Court's Order of January 14, 1991, renders the Plaintiff's Motion to Compel moot.

Respectfully submitted,
s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

Appendix O

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 17th day of January, 1991.

s/Alan Mark Turk
ALAN MARK TURK

APPENDIX P — MEMORANDUM OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVIS HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW and LUKE SKYYWALKER RECORDS

MEMORANDUM

This case involves a claim by Acuff-Rose Music, Inc. ("Acuff-Rose") for copyright infringement of its song, "Oh, Pretty Woman." Acuff-Rose has named as defendants the members of the rap group 2 Live Crew and Luke Skyywalker Records. The plaintiff contends that the defendants unfairly are trying to cash in on the popularity of "Oh, Pretty Woman."

For the reasons stated below, the Court finds that no genuine issue of material fact exists regarding the allegation of copyright infringement. This claim is dismissed pursuant to Fed. R. Civ. P. 56. The plaintiff's pendent tort claims are preempted by 17 U.S.C. § 301.

Appendix P

I.

This copyright case involves Roy Orbison's musical hit "Oh, Pretty Woman" as recorded by 2 Live Crew. Roy Orbison and William Dees co-authored "Oh, Pretty Woman" in 1964 and assigned their rights in the song to Acuff-Rose Music the same year. "Oh, Pretty Woman" was copyrighted by Acuff-Rose in 1964. Since then the song has continued to generate profits for Acuff-Rose.

On July 5, 1989, 2 Live Crew's manager, Linda Fine, wrote Gary Teifer of Opryland U.S.A., Inc. and Acuff-Rose. Fine informed Teifer that 2 Live Crew was going to parody "Oh, Pretty Woman," that Orbison and Dees would receive full credit as owners and authors, and that 2 Live Crew would pay Acuff-Rose the statutorily required rate for use of the song. Teifer responded on July 17, denying the license request and informing Fine that "we cannot permit the use of a parody of 'Oh, Pretty Woman.' "

On July 15, 1989, 2 Live Crew released its version of "Oh, Pretty Woman" on record albums, tapes and compact discs, entitled "As Clean As They Wanna Be." The release, called "Pretty Woman," is on side B, sandwiched between "Me So Horny" and "My Seven Bizzos." Both the compact disc cover and compact disc itself acknowledge Orbison and Dees as the authors of "Oh, Pretty Woman" and Acuff-Rose as the publisher.

Almost one year later, on June 18, 1990, Acuff-Rose sued 2 Live Crew and their record company, Luke Skyywalker Records, for copyright infringement, interference with business relations, and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman." Acuff-Rose contends that the lyrics of "Oh, Pretty Woman" as sung by 2 Live Crew "are not consistent with good taste or would

disparage the future value of the copyright." Moreover, Acuff-Rose charges that 2 Live Crew's music is substantially similar in melody to "Oh, Pretty Woman" and the lyrics of the first verse are substantially similar to that of the original version. In response, defendants have moved for summary judgment. They argue that "Pretty Woman" is a parody that constitutes fair use under 17 U.S.C. § 107 of the Copyright Act, 17 U.S.C. §§ 101-914 (1982). They also argue that the two tort claims are preempted by 17 U.S.C. § 301. Pursuant to Fed. R. Civ. P. 67, 2 Live Crew has deposited with the Court the $13,867 it maintains is due to Acuff-Rose for use of its song as required by the Copyright Act. This decision does not address whether that sum reflects adequate compliance with the Act.

The resolution of this motion presents two questions for the Court to address: first, whether "Pretty Woman" constitutes fair use of copyrighted material pursuant to 17 U.S.C. § 107; and second, whether the plaintiff's state law claims are preempted by federal copyright law.

II.

A. Standard of review

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. In responding to a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

The Supreme Court concluded in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that a dispute about a material fact is "genuine" within the meaning of Fed. R. Civ. P. 56 only if "the evidence is such that a responsible jury could return a verdict for the nonmoving party." 477 U.S. at 248. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Id.* at 252. Of course, the court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. *Id.* at 255.

B. Fair Use

To foster the widespread dissemination of ideas, the copyright system is "designed to assure contributors to the store of knowledge a fair return for their labors." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985). *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (purpose of copyright is to create incentives for creative effort). Notwithstanding the monopoly granted to the owner, fair use has been defined as the "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent." *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property*, 260 (1944)).

Section 107 of the Copyright Act instructs courts to balance the following four factors:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

> (1) the purpose and character of the use, including whether such use is a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

At a minimum, courts have indicated that evaluation of these four factors is required. But they are not exclusive. *Harper & Row*, 471 U.S. at 560; *Pacific & Southern v. Duncan*, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

Before the court may move to the merits of the statutory fair use analysis, it must consider whether this case is suitable for summary judgment. Plaintiffs allege that a number of material issues of fact remain. "Fair use is a mixed question of law and fact." *Harper & Row*, 471 U.S. at 560 (quoting *Pacific & Southern Co.*, 744 F.2d at 1495 n. 8). "Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court 'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyright work.' " *Id.* Based on the evidence presented by the parties in this case, including copies of the songs, correspondence and affidavits, whether defendant's parody constitutes fair use under 17 U.S.C. § 107 is a question of law for the Court to determine. *See Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (although discovery not commenced, since "parties dispute only the ultimate conclusions to be drawn from the admitted facts . . . we can make them without usurping the function of the jury").

Since no genuine material issues of fact remain, the Court will proceed to address the four factors cited by § 107.[1]

1. *Purpose and Character of the Use.* The first factor the Court must consider is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. As examples of fair use, the preamble of § 107 lists "criticism, comment, news reporting, teaching . . . scholarship, [and] . . . research." 17 U.S.C. § 107. Congress has listed parody as one of those activities that might qualify for the fair use exception. *See* H.R. Rep No. 1476, 94th Cong., 2d Sess., 65 (1976), *reprinted in* 1976 U.S. Code Cong. Admin. News 5680. Obviously, 2 Live Crew's song is included on a commercially distributed record album sold for the purpose of making a profit.

Although 2 Live Crew's primary goal in releasing "As Nasty As They Wanna Be" is to sell its music, that finding "does not necessarily negate a fair use determination. . . ." 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-70 (1990). In *Harper & Row*, the Court stated that a commercial purpose merely "tends to weigh against a finding of fair use." *Harper & Row*, 471 U.S. at 562. "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.*

Importantly for the purposes of this case, it is plain that 2 Live

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1. No published Sixth Circuit opinion addresses this type of copyright infringement question. *Compare Pro Arts, Inc. v. Hustler Magazine, Inc.*, 787 F.2d 592 (6th Cir. 1986) (per curiam) (unpublished text in Westlaw). Accordingly, this Court relies on opinions from other circuits, notably the Second and Ninth Circuits.

Crew also desired to parody the original version of "Oh, Pretty Woman."[2] In copyright law, courts have long recognized that satirical expression is "deserving of substantial freedom — both as entertainment and as a form of social and literary criticism." *Berlin v. E.C. Publication, Inc.*, 329 F.2d 541, 545 (2nd Cir.), *cert. denied*, 379 U.S. 822 (1964). Including parody within the fair use doctrine has been recognized as "a means of fostering the creativity protected by the copyright law." *Warner Bros., Inc. v. American Broadcasting Companies*, 720 F.2d 231, 242 (2d Cir. 1983).

Many parodies "distributed commercially may be 'more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work.' " *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (quoting *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981)); *Cf. Original Appalachian Artworks v. Topps Chewing Gum*, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986) (holding that primary purpose behind defendant's parody "is not an effort to make a social comment but is an attempt to make money"). As discussed in Section II.B.4, *infra*, the defendant may rebut the presumption of commercial use as described in *Harper & Row* by convincing the court that the parody does not unfairly diminish the economic value of the original. *Fisher*, 794 F.2d at 437.

Acuff-Rose argues that the song is not a parody. It contends

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2 *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366, 376 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979), defines parody as "a work in which the language or style of another work is closely imitated or mimicked for comic effect or riducule." *See* Dorson, *Satiric Appropriation and the Law of Libel, Trademark and Copyright: Remedies Without Wrongs*, 65 B.U.L. Rev. 923, 924 (1985) (Parody "is a potent form of social commentary which attempts to expose the foibles and follies of society in direct, biting, critical, and often harsh language — tempered by humor.").

that the 2 Live Crew's version does not comment on the copyrighted work because the former is "primarily about the physical attributes of women" and the latter is "primarily about loneliness."

But based on a comparison of the two songs and the affidavits provided to the Court, it is apparent that 2 Live Crew has created a comic parody of "Oh, Pretty Woman."[3] The theme, content and style of the new version are different than the original. In his affidavit, Luther Campbell, also known as Luke Skyywalker, states that his version of "Oh, Pretty Woman" was written as a parody designed "through comic lyrics, to satirize the original work. . . ." He acknowledges that he purposefully copied selected music and lyrics from "Oh, Pretty Woman" as a device to help listeners identify the parody with the original version. Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody.

2 Live Crew's lyrics provide the strongest evidence of its attempt to parody "Oh, Pretty Woman." Although the parody starts out with the same lyrics as the original, it quickly degenerates into a play on words, substituting predictable lyrics with shocking ones.[4] The first lyrical hint that something is amis comes when a

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3 Gerry Teifer's comment in his July 17, 1990 letter to 2 Live Crew that the new version of "Oh, Pretty Woman" is a parody does not necessarily equate with the specific legal definition of parody. Teifer says in his affidavit that he never heard the 2 Live Crew version prior to denying their licensing request.

4 It is unclear exactly what Acuff-Rose means when it complains in its response to the Motion for Summary Judgment that the parody "dirt[ies]" the copyright. 2 Live Crew's version is neither obscene nor pornographic. Even if the work included pornographic references, that does not necessarily preclude a finding of fair use. *Pillsbury Co. v. Milky Way Productions, Inc.* 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

loud, barking laugh immediately follows the first two words of the parody, "pretty woman." (Laughter follows later in the song too.) The purpose of the laughter is soon explained as the ensuing choruses respectively depict a big, hairy woman, a bald-headed woman, and a "two-timin' " woman. Roy Orbison's pretty woman becomes akin to "Cousin It," the ugly, bit character featured on the TV series "The Addams Family." The physical attributes of the subject woman deviate from a pleasing image of feminity to bald-headed, hairy and generally repugnant. To complete the thematic twist, at the end of the parody the "two-timin' " woman turns out to be pregnant. The phrase, "the baby ain't mine" is completely inconsistent with the tone and story of the romantic original. In sum, 2 Live Crew is an anti-establishment rap group and this song derisively demonstrates how bland and banal the Orbison song seems to them. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (noting that "if the copyrighted [work] is not at least in part an object of the parody, there is no need to conjure it up"); Defendant's Affidavits of Oscar Brand and William Krasilovsky.

The parody also employs a number of musical devices that exaggerate the original and help to create a comic effect. 2 Live Crew uses the same drum beat and bass riff to start its song. But unlike the original, only five seconds into the song and immediately following the bass riff, 2 Live Crew inserts a heavily distorted "scraper," indicating a significant disparity in style. The same scraper is used four seconds later to reiterate that message and subsequently at the end of the song as well. Also at the beginning of the parody, the first soloist sings in a different key than the chorus. In addition, four times during the parody, 2 Live Crew repeats Orbison's bass riff over and over again, double the number of times on the original, until the riff begins to sound like annoying scratch on a record.

Although the Court has determined that 2 Live Crew's version parodies the original, a finding of a parody does not necessarily equate with a finding of fair use. *Fisher*, 794 F.2d at 435. "Parody was not classified as a presumptively fair use . . . . Each assertion of the 'parody defense' must be considered individually, in light of the statutory facts, reason, experience, and of course, the general principles developed in past cases." *Id.* As a result, the Court will examine the remaining three statutory elements of § 107.

2. *Nature of the Copyrighted Work.* The second factor is the nature of the copyrighted work. In addressing this element, "the court may consider, among other things, whether the work was creative, imaginative, and original, . . . and whether it represented a substantial investment of time and labor made in anticipation of financial return." *MCA*, 677 F.2d at 182 (citation omitted). *See also Harper & Row*, 471 U.S. at 563; 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-78. Since "Oh, Pretty Woman" is a published work, with creative roots, this factor weighs in favor of the plaintiff.

3. *Amount of Quotation.* The third factor to address is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. This element contains quantitative and qualitative elements and as a result the amount of protected material that a copier may take under the rubric of fair use will vary from case to case.

For instance, fair use may not allow a person to copy the most qualitatively "valuable" portion of the work, even if such portion constitutes a relatively small amount of the entire protected material. *See, e.g., Harper & Row*, 471 U.S. at 565-66. In *Harper & Row* the Supreme Court noted that a taking that is "insubstantial with respect to the infringing work" does not necessarily mean that

fair use applies. *Id.*, 471 U.S. at 565. By contrast, "the copying of an entire work does not preclude fair use *per se.*" *Hustler Magazine, Inc., v. Moral Majority Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986).

Acuff-Rose argues that the portions taken from "Oh, Pretty Woman" are both qualitatively and quantitatively significant. According to the plaintiff's musicologist, Earl V. Spielman, the two works are substantially similar. The copying includes the name of the song and key lyrics. The 2 Live Crew version also includes the same guitar refrain, opening drum beat and melody and chorus. Affidavit of Earl V. Spielman. Since the original song is so popular, Acuff-Rose contends that 2 Live Crew does not need to copy much of the original in order to conjure up its memory.

But the conclusions drawn by the plaintiffs does not address whether 2 Live Crew used more of the copyrighted work than was necessary to recall or conjure up "Oh, Pretty Woman." *See, e.g., Fisher,* 794 F.2d at 438 n.4 (holding that affidavits conflicting on question of substantiality are irrelevant given that issue of extent of taking is a question of law). No one disputes that 2 Live Crew copied "Oh, Pretty Woman." But the question about substantial similarity cannot be divorced from the purpose for which the defendant's work will be used.

It is a settled aspect of copyright law that parodists have the right to conjure up the object of the parody. In *Berlin*, 329 F.2d 541, the court stated that where "the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper." *Id.* at 545. *See Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252,

253 (2d Cir. 1980) ("parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point"). Indeed, the effectiveness of a parody inherently depends on its ability to copy the original work.

Several courts that have balanced the conflict between the rights of the copyright owner against the goals of the parodist have concluded that parodies of songs require more leeway than other types of parodies. The Ninth Circuit reasoned in *Fisher* that resolution of the substantiality question depends on the medium of the respective works. In *Fisher,* the plaintiffs sued for copyright infringement of a song entitled "When Sunny Gets Blue." As in this case, the plaintiffs previously had denied defendant Dees' request to record a parody of the original. Nonetheless, Dees released his parody song "When Sonny Sniffs Glue," copying the musical theme of the original while changing the lyrics. *Id.* at 434. The *Fisher* court observed that:

> Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for accuracy," provides some license for "closer" parody. . . . To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in this original expression."

Fisher, 794 F.2d at 439 (citations omitted). Likewise, in *Berlin*, the Second Circuit affirmed the application of the fair use defense in a case where the defendants, publishers of "Mad Magazine," had

published a volume which parodied twenty-five of the plaintiff's song lyrics in same meter. "The disparaties in theme, content and style between the original lyrics and the alleged infringements could hardly be greater." *Berlin*, 329 F.2d at 545. *Cf. Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (holding that fair use defense cannot apply where the copying is virtually complete or almost verbatim and that parodist may only use what is necessary to conjure up the original), *cert. denied*, 439 U.S. 1132 (1979); *MCA*, 677 F.2d at 185 (holding that where defendant's song "Cunnilingus Champion of Co. C" did not parody plaintiff's song "Boogie Woogie Bugle Boy of Company B," the amount copied by defendants from the original song was so substantial as to be unfairly excessive).

In this case, 2 Live Crew has not mimicked so much of "Oh, Pretty Woman" that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates*, this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin*. In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher*, 794 F.2d at 439.

4. *Effect on the Market.* Finally, as discussed in the first statutory factor under § 107, the Court must examine the effect of the use upon the potential market for or value of the copyrighted work. The Supreme Court has referred to the fourth factor as "the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. *Accord Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980).

The Supreme Court reasoned that this element should be weighed most heavily since "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create." *Sony Corp.*, 464 U.S. at 450. As a result, fair use, "when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Harper & Row*, 471 U.S. at 566-67 (quoting 1 Nimmer, *Nimmer on Copyright*, § 1.10[D] at 1-87). The Court emphasized that to deny a finding of fair use, one need show only that if the defendant's use " 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.' " *Harper & Row*, 471 U.S. at 568 (quoting *Sony Corp.*, 464 U.S. at 451).

Neither *Harper & Row* nor *Sony* involved a parody. But in *Fisher*, which involved a copyright infringement claim and a parody defense, and the Ninth Circuit held that the parody "When Sonny Sniffs Glue" had no cognizable economic impact on the original song, "When Sunny Gets Blue." It concluded that commercial substitution was unlikely, remarking that:

> "When Sunny Get Blue" is a "lyrical song concerning or relating to a woman's feelings about lost love and her chance for .... happiness again." By contrast, the parody is a 29-second recording concerning a woman who sniffs glue, which "ends with noise and laughter mixed into the song." We do not believe that consumers desirous of hearing a romantic and nostalgic ballad such the composers' song would be satisfied to purchase the parody instead.

> Nor are those fond of parody likely to consider "When Sunny Gets Blue" a source of satisfaction. The two works do not fulfill the same demand.

Fisher, 794 F.2d at 438. *See also, Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983) ("Where the copy does not compete in any way with the original . . . concern is absent."), *cert. denied*, 469 U.S. 823 (1984); *Elsmere Music*, 482 F. Supp. 741, 746-47 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (although defendants appropriated the heart of plaintiff's song, since the copying was a parody it could not fulfill demand for the original version). *Cf. New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517, 1528 (S.D.N.Y. 1988) (parody defense rejected where defendant's rap video would be likely to harm the value of carefully planned derivative use of plaintiff's movie in the rap video market).

With respect to the parody "Pretty Woman," this fourth factor favors the defendants. As in *Fisher*, it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different. The odds of a record collector seeking the original composition who would also purchase the 2 Live Crew version are remote. Defendant's Affidavit of William Krasilovsky. "The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Defendant's Affidavit of Oscar Brand. Second, while Acuff-Rose is not required to prove damages, *Marcus v. Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983), it has not produced convincing evidence that any harm to any existing or potential market has occured. *Cf. Harper & Row*, 471 U.S. at 567 (where

trial court found an actual effect on the market). On a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. Acuff-Rose must adduce more than a scintilla of evidence to overcome the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Plaintiffs attempt to focus on their possible future losses and mount two different arguments. First, they contend that 2 Live Crew's parody prevents them from marketing future derivative works, such as a rap version or even their own "burlesque" of the Orbison original. Second, they argue that "Oh, Pretty Woman" "has been tarnished by being associated with these lyrics and with 2 Live Crew" and that will result in the loss of future licensing arrangements.

Since 2 Live Crew's version of "Oh, Pretty Woman" is a parody, that release has not prevented Acuff-Rose from recording whatever version of the original it desires. Likewise, plaintiff's argument that it would be prevented from releasing a parody of their work is meritless. In a world where copyright monopoly stretched to that great extent, parodies would be unlikely ever to be approved by the original author. *See* 3 Nimmer, *Nimmer on Copyright*, § 13.05[C] at 13-90.12; *Fisher*, 794 F.2d at 437 ("Parodists will seldom get permission from those whose works are parodied. . . . The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought.")

Examining the latter argument, several courts have discounted attempts by copyright holders to claim infringement based on the impact of alleged criticism. "In assessing the

economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically'. . . . Biting criticism suppresses demand; copyright infringement usurps it." *Fisher*, 794 F.2d at 437-38 (citations omitted). *Also see Consumers Union*, 724 F.2d at 1050-51; *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

III.

Having applied § 107's four factor, the Court finds that they weigh in favor of the defendants. 2 Live Crew's "Pretty Woman" is a parody. Its purpose is to poke fun at the original version of "Oh, Pretty Woman." In so doing, the parody copies from the original. Notwithstanding the copying needed to conjure up the original song, for the foregoing reasons the Court concludes that 2 Live Crew's use of the original copyrighted song is protected fair use.

IV.

Defendants also argue that plaintiff's state law claims for interference with business relations and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman" are preempted by § 301 of the Copyright Act. 17 U.S.C. § 301 describes the extent to which the Copyright Act preempts state law causes of action based on copyright. It provides in pertinent part:

> (a) On and after January 1, 1978 all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of

> copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
>
> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

A two-part test determines when § 301(a) preempts at common law tort claim. "First, the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in [17 U.S.C. § 102]. Second, the right must be equivalent to any of the rights specified in [17 U.S.C. § 106]." *Baltimore Orioles v. Major League Baseball Players Assn.*, 805 F.2d 663, 674 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987). *See also Harper & Row Publishers, Inc., v. National Enterprises*, 723 F.2d 195, 199-200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

In this case, Acuff-Rose focuses on the second factor of the § 301 analysis. It argues that the tort claim is not "equivalent to "

the rights set forth in § 106. A right under state law is equivalent if it creates or destroys any of the rights contained in Copyright Act. *Id.* at 676; *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 662-63 (6th Cir.), *aff'g in pertinent part*, 496 F. Supp. 404, 443-44 (S.D. Ohio 1980). Section 106 of the Copyright Act grants plaintiffs the exclusive right to reproduce, distribute, perform and display the copyrighted work, "Oh, Pretty Woman."[5]

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5. Section 106 of the Copyright Act provides:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce the copyright work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyright work publicly.

With respect to Acuff-Rose's claim for interference with business relationships, Tennessee common law provides that "[O]ne's business is entitled to protection 'from tortious interference by a third person who, in interfering therewith, is not acting in the exercise of some right, such as the right to compete for business.' " *Lann v. Third National Bank*, 198 Tenn. 70, 72, 277 S.W.2d 439, 440 (1955). To prevail on such a claim, the plaintiff must show malice, ill will, or wrongful motive. *Id. See also Testerman v. Tragesser*, 789 S.W.2d 553, 556-57 (Tenn. App. 1989) (citing *Lann*). Plaintiff alleges that it has lost benefits flowing from its copyright monopoly. Like the copyright infringement claim, violation of the state law claim rests on a finding of unauthorized copying. "In both cases, it is the act of unauthorized publication which causes the violation. The enjoyment of benefits from derivative use is so intimately bound up with the right itself that is could not possibly be deemed a separate element. . . ." *Harper & Row*, 723 F.2d at 201. In addition, the fact that the state law cause of action requires proof of intent does not necessarily preclude a finding of preemption. The Second Circuit concluded in *Harper & Row* that:

> [T]he fact that cross-appellants pleaded additional elements of awareness and intentional interference, not part of a copyright infringement claim goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental nonequivalence between the state and federal rights implicated.

Id. Since the claim is equivalent to rights established by § 106 the cause of action is preempted by federal law. *See also, Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289, 295 (E.D. Tex. 1988) (holding that plaintiff's claim for tortious interference with

contractual relations is preempted by § 301); *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565, 1572-73 (N.D.Ga. 1988) (same); *McNabb Bennett & Associates, Inc. v. Terp Meyers Architects*, No. 85-C-8792, (N.D. Ill. June 19, 1986) (available on Westlaw) (same).

The question about whether § 301 preempts any Tennessee tort for interference with prospective business advantage is trickier. The plaintiff has not cited any Tennessee case in which recovery was allowed for wrongful interference not involving a breach of contract, and it appears that Tennessee has not developed any significant body of law in this area. *Warde v. Kaiser*, 887 F.2d 97, 103 n.1 (6th Cir. 1989) (citing *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 874 (M.D. Tenn. 1980) (Wiseman, J.)).

Even assuming arguendo that interference with prospective business advantage constitutes a separate tort under Tennessee law, such a cause of action is nevertheless preempted by federal law. As the Court found for the interference with business relationship claim, this second tort is equivalent to the rights specified in 17 U.S.C. § 106 and thus is preempted by federal law as well. *See e.g, Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1240 (C.D. Cal. 1987) (holding that plaintiff's claim for tortious intereference with prospective business advantage is preempted by § 301).

s/ Thomas A. Wiseman
THOMAS A. WISEMAN, JR.
CHIEF JUDGE

APPENDIX Q — ORDER GRANTING PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW and LUKE SKYYWALKER RECORDS

ORDER

For the reasons stated in the accompanying Memorandum, the Motion for Summary Judgment made by defendants 2 Live Crew and Luke Skyywalker Records against plaintiff Acuff-Rose Music, Inc. is granted pursuant to Rule 56 of the Federal Rules of Civil Procedure. 2 Live Crew's rendition of "Pretty Woman" is a parody of the original "Oh, Pretty Woman" that constitutes fair use under 17 U.S.C § 107 of the Copyright Act, 17 U.S.C. §§ 101-914 (1982). *See, e.g., Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

The two Tennessee state law claims for interference with business relations and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman" are preempted by 17 U.S.C. § 301.

Appendix Q

IT IS SO ORDERED.

s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.
Chief Judge

APPENDIX R — MOTION FOR ENTRY OF SUPPLEMENTAL ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION FOR ENTRY OF SUPPLEMENTAL ORDER

Comes now the Plaintiff, Acuff-Rose Music, Inc. ("Acuff-Rose"), and moves the Court, pursuant to 28 U.S.C. § 1292(b) and the applicable Federal Rules of Civil Procedure, for a supplemental order certifying for purposes of appeal the Court's January 14, 1991, grant of summary judgment on the issues of fair use and of preemption, since there is no just reason for delay and since such issues constitute controlling questions of law, the

prompt resolution of which will materially advance the ultimate termination of the litigation. In support of its motion, Acuff-Rose would show as follows:

1. Acuff-Rose commenced this action on June 18, 1990.

2. On August 1, 1990, Defendants moved pursuant to Rule 67 of the Federal Rules of Civil Procedure to deposit into the Court the sum of $13,867.56. The Court allowed the deposit to be made by order dated August 24, 1990.

3. The Court's Memorandum and Order entered January 14, 1991, found The 2 Live Crew's rendition of "Pretty Woman" to be a parody that constituted fair use. The Order granted Defendants' motion for summary judgment, denying Acuff-Rose's copyright infringement claims and further holding that the two pendent state law claims for interference with business relations and interference with prospective business advantage were preempted. The Court acknowledged that Defendants had deposited a sum with the Court pursuant to Rule 67 of the Federal Rules of Civil Procedure but reserved the question whether the sum constituted adequate compliance with the Copyright Act in discharging Defendants' obligation to Plaintiff under the Act.

4. By letter dated January 30, 1991, counsel for Defendants forwarded a copy of a royalty statement and represented that according to this statement Defendants owed Acuff-Rose $11,956.49. Counsel for Defendants further noted that this amount was $1,911.07 less than the amount deposited with the Court in August 1990. See attached Exhibit A.

5. As of the date of this Motion, no disposition of the funds deposited pursuant to Rule 67 has been made.

6. On February 11, 1991, Acuff-Rose filed a Notice of Appeal in this action.

7. Because the Court's January 14 Memorandum and Order reserved the question as to the adequacy of the sum deposited with the Court, the January 14, 1991, Order may be less than the full and final judgment required to provide jurisdiction for the Sixth Circuit Court of Appeals. Out of an abundance of caution, Acuff-Rose moves for a supplemental order certifying for purposes of appeal the Court's January 14, 1991, ruling on the issues of fair use and preemption, since there is no just reason for delay, and since such issues constitute controlling questions of law, the prompt resolution of which will materially advance the ultimate termination of the litigation.

8. Further, Acuff-Rose respectfully disagrees with the Court's determination on the controlling issues of law decided on January 14, and therefore submits it is entitled to sums far in excess of those that Defendants concede are due to discharge their obligation to Acuff-Rose under the Copyright Act. Acuff-Rose expressly reserves its position and right to claim additional amounts due and owing in excess of those deposited with the Court in the event its appeal is successful or in further proceedings. As set forth in Mr. Turk's letter of January 30, 1991, Defendants contend that the sum of $11,956.49 will adequately discharge their obligation to Acuff-Rose due under the Copyright Act. While Acuff-Rose does not agree with this contention, there is obviously no dispute that Defendants owe Acuff-Rose at least $11,956.49. Accordingly, Acuff-Rose further moves that the Court enter a separate order directing payment of $11,956.49 to Acuff-Rose and retaining the balance of the $13,867.56 deposited by Defendants pending further proceedings.

Appendix R

9. In view of these considerations, Acuff-Rose respectfully requests an expedited resolution of this motion.

Respectfully submitted,

KING AND BALLOW

By: s/ E. Andrew Norwood
Alan L. Marx
Elizabeth B. Marney
E. Andrew Norwood
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue North
Nashville, TN 37219
(615) 259-3456

Of Counsel:

Hal L. Willis
Opryland USA, Inc.
2806 Opryland Drive
Nashville, TN 37219

Appendix R

CERTIFICATE OF SERVICE

I hereby certify that on February 13th, 1991, a true and exact copy of the foregoing Motion for Entry of Supplemental Order was served on Defendants by placing a copy of same in the U.S. Mail, postage prepaid thereon, addressed to:

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

Alan M. Turk, Esq.
Sanford R. Ross, Esq.
3310 West End Avenue
Nashville, TN 37203

s/ E. Andrew Norwood
E. Andrew Norwood

APPENDIX S — SUPPLEMENTAL ORDER CERTIFYING INTERLOCUTORY APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx,

_p/k/a
THE 2 LIVE CREW,
and

LUKE SKYYWALKER RECORDS,

Defendants.

SUPPLEMENTAL ORDER

On January 14, 1992, the Court issued a memorandum and an Order which the clerk entered on the Civil docket pursuant to Rules 58 and/or 79(a) of the Federal Rules of Civil Procedure. In that Memorandum and Order the Court held that The 2 Live Crew's rendition of "Pretty Woman" was a parody that constituted a fair use of Plaintiff's copyrighted work, "Oh, Pretty Woman" and that the two pendent state law claims were preempted by 17 U.S.C. § 301. The Court acknowledged that funds had been deposited by

Appendix S

Defendants with the Court pursuant to Rule 67 of the Federal Rules of Civil Procedure, but expressly reserved the question whether that sum was adequate compliance with the Copyright Act in discharging Defendants' obligation to Plaintiff under the Act.

Because the Court reserved its decision as to the adequacy of the sum deposited under Rule 67, the Order of January 14, 1991, is not an order appealable under 28 U.S.C. §§ 1291 and 1292 except pursuant to 28 U.S.C. § 1292(b). In the Court's opinion, the January 14 Order and Memorandum involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order and Memorandum will materially advance the ultimate termination of the litigation. There is no just reason for delay. The Court hereby certifies that such Order should be appealable pursuant to 28 U.S.C. § 1292(b). This Supplemental Order is entered in supplementation and amendment of the Order and Memorandum entered on January 14, 1991.

s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.
Chief Judge

APPENDIX T — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING INTERLOCUTORY APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 91-8507

ACUFF-ROSE MUSIC, INC.,

Petitioner,

v.

LUTHER R. CAMPBELL, also know as Luke Skyywalker; CHRISTOPHER WONGWON, also known as Fresh Kid Ice; MARK ROSS, also known as Brother Marquis; DAVID HOBBS, also known as Mr. Mixx, professionally known as THE TWO LIVE CREW and LUKE SKYYWALKER RECORDS,

Respondents.

BEFORE: JONES and SUHRHEINRICH, Circuit Judges; and JOINER, Senior District Judge*.

ORDER

Plaintiff seeks permission under 28 U.S.C. § 1292(b) to appeal an order granting summary judgment to defendants on plaintiff's claims of copyright infringement, interference with business relationships, and interference with prospective business advantages. The order reserved decision on whether certain funds deposited by defendants in the district court with sufficient

---

* The Honorable Charles W. Joiner, Senior District Judge for the Eastern District of Michigan, sitting by designation.

compensation to plaintiff under the Copyright Act. The defendants do not oppose the petition.

To obtain permission to appeal pursuant to 28 U.S.C § 1292(b), the movant must show that: (1) the question involved is one of law; (2) the question is controlling; (3) there is substantial ground for differences of opinion respecting the correctness of the district court's decision; and (4) an immediate appeal would materially advance the ultimate termination of the litigation. *Cardwell v. Chesapeake & Ohio Ry. Company,* 504 F.2d 444, 446 (6th Cir. 1974). Review under § 1292(b) should be sparingly granted and then only in exceptional cases. *Kraus v. Board of County Road Comm'rs,* 364 F.2d 919, 922 (6th Cir. 1966); *In re April 1977 Grand Jury Subpoenas,* 584 F.2d 1366, 1369 (6th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 934 (1979); *see also Lynch v. Johns-Manville Sales Corp.,* 701 F.2d 44 (6th Cir. 1983). Upon review and consideration, we conclude that immediate appeal will not materially advance the ultimate termination of the litigation.

It therefore is ORDERED that the petition for leave to appeal is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green, Jr.
Clerk

APPENDIX U — MOTION FOR DISTRIBUTION OF FUNDS OR PERMISSION TO FILE ADDITIONAL BRIEFS FILED JUNE 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF ACUFF-ROSE'S MOTION FOR DISTRIBUTION OF FUNDS OR PERMISSION TO FILE ADDITIONAL BRIEFS

Comes now the Plaintiff, Acuff-Rose Music, Inc., ("Acuff-Rose") and moves the Court either to distribute in a manner consistent with the Court's January 14, 1991, Memorandum and Order ("January 14 Order") the funds being held by the Clerk of the Court or to direct further briefing of the impact of the Court's Order on the distribution of the funds. In support of this motion, Acuff-Rose states:

Appendix U

1. On August 24, 1990, the Court ordered that funds, the Defendants represented to be all the funds owed to Acuff-Rose, be deposited with the Clerk of the Court.

2. In the January 14 Order, the Court granted summary judgment to the Defendants but reserved the question of "whether the sum [deposited on August 24] reflects adequate compliance with the [Copyright] Act." January 14 Order at 3.

3. On February 19, 1991, the Court granted a 28 U.S.C. § 1292(b) certification of the January 14 Order.

4. On April 4, 1991, the Sixth Circuit Court of Appeals refused permission to appeal under the certification.

5. Significant legal issues are raised by the January 14 Order and by a distribution of the funds not inconsistent with that Order. The Court would benefit from briefing on those issues.

Therefore, Acuff-Rose moves that the Court either distribute the funds being held or set a briefing schedule so that the parties may address the issues raised.

Respectfully submitted,

KING & BALLOW

BY: s/ Francis J. Del Casino
R. Eddie Wayland
E. Andrew Norwood
Francis J. Del Casino

Appendix U

1200 Noel Place
200 Fourth Avenue North
Nashville, TN 37219

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Of Counsel:

Hal Willis
Opryland USA, Inc.
2806 Opryland Drive
Nashville, TN 3721
Acuff-Rose Music, Inc.

Appendix U

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Plaintiff Acuff-Rose's Motion For Distribution of Funds Or Permission To File Additional Briefs was duly served this 10th day of June 1991, by U.S. Mail, postage prepaid addressed as follows:

Alan M. Turk, Esq.
Sanford R. Ross, Esq.
3310 West End Avenue
Fourth Floor
Nashville, Tennessee 37203

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

s/ Francis J. Del Casino
Francis J. Del Casino

APPENDIX V — MOTION TO AMEND COMPLAINT FILED JUNE 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF'S MOTION TO AMEND COMPLAINT

Pursuant to Federal Rule of Civil Procedure 15, Plaintiff Acuff-Rose Music, Inc. ("Acuff-Rose") moves for permission to amend the Complaint in this action. In Support of this Motion, Acuff-Rose states:

1. Acuff-Rose filed the Complaint in this action for copyright infringement and interference with business relationships and with prospective business advantage on June 18, 1990, based on

Appendix V

Defendants' creation and distribution of a musical work entitled "Pretty Women." Acuff-Rose asserted, *inter alia*, that this work infringed Acuff-Rose's copyrighted work "Oh, Pretty Woman" and interfered with Acuff-Rose's business interests.

2. Defendants' label copy for "Pretty Woman" states that Roy Orbison and William Dees are the authors and states that Acuff-Rose Music, Inc. is the publisher. *See* Exhibit A.

3. On January 14, 1991, this Court granted Defendants' Motion for Summary Judgment on the grounds that Defendants' "Pretty Woman" was not an infringing derivative work because it was a parody of Acuff-Rose's "Oh, Pretty Woman" and because Defendants' parody use was a fair use under 17 U.S.C. § 107. The Court also held the Acuff-Rose's state law claims were preempted by the Copyright Act.

4. The Court's January 14, 1991, ruling in effect makes Defendants' work a new copyrightable work and one that contains a false and misleading designation of origin.

5. Even though Acuff-Rose specifically denied permission for its copyrighted work to appear on Defendants' album and never gave permission for its name to appear on Defendants' album, Defendants mislabelled and falsely designated Acuff-Rose Music, Inc. as the source of the work that appeared on Defendants' album under the name "Pretty Women." The mislabelling and misdesignation violates 15 U.S.C. § 1125(a), which protects fair business competition by prohibiting the use in commerce of false and misleading designations of origin.

6. Furthermore, Defendants' use of Acuff-Rose's name on the label copy violates 15 U.S.C. § 1125(a) by falsely indicating a

sponsorship, endorsement, license or other relationship between Defendants and Acuff-Rose.

7. Acuff-Rose seeks permission to amend the Complaint in this action to assert a claim pursuant to 15 U.S.C. § 1125(a) against Defendants for the false designation of origin and the mislabelling of the composition included on the album.

8. Acuff-Rose has filed and served herewith the proposed Amended Complaint.

9. Acuff-Rose has filed and served herewith a Memorandum of Law in support of this motion.

WHEREFORE, based on the foregoing, Acuff-Rose respectfully requests that the Court grant leave to amend the complaint in this action.

Respectfully submitted,

KING & BALLOW

s/ By:
Francis J. Del Casino
R. Eddie Wayland
E. Andrew Norwood
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue, North
Nashville, Tennessee 37219
(615) 259-3456

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Of Counsel:

Hal Willis
Opryland USA, Inc.
2806 Opryland Drive
Nashville, TN 37214

Acuff-Rose Music, Inc.

Appendix V

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Plaintiff's Motion to Amend Complaint was duly served this 10th day of June, 1991, by U.S. Mail, postage prepaid, addressed as follows:

Alan M. Turk, Esq.
Sanford R. Ross, Esq.
3310 West End Avenue
Fourth Floor
Nashville, Tennessee 37203

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

s/ Francis J. Del Casino
Francis J. Del Casino

Appendix V

EXHIBIT A — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging)

APPENDIX W — DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR DISTRIBUTION OF FUNDS DATED JUNE 21, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, DIVISION

Case No. 3 90-0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR DISTRIBUTION OF FUNDS

The Plaintiff has moved for the Court to modify its Order entered on August 24, 1990, which provided that the Thirteen Thousand Eight Hundred Sixty Seven and 56/100 Dollars ($13,867.56) deposited by the Defendants in accordance with Rule 67 of the Federal Rules of Civil Procedure should be held by the Court during the pendency of the above captioned litigation or until such time as the Court determines said funds should be

released. The Plaintiff now seeks distribution of the subject funds. However, simultaneously with the Plaintiff's Motion for Distribution of Funds, the Plaintiff filed a Motion to Amend its Complaint alleging allegations under the Lanham Act. The Plaintiff's allegations under the Lanham Act are clearly inconsistent with the Plaintiff's Motion to Distribute Funds as compensation under the Copyright Act, 17 U.S.C. § 101, et seq. and inconsistent with the Court's Order of Summary Judgment entered on January 14, 1991, which held as a matter of law that the Defendants' version was a parody and constituted fair use under the Copyright Act, 17 U.S.C. § 107.

The Defendants respectfully assert that the Plaintiff can not, in good faith, asset that it is entitled to amend its Complaint and include allegations that the Defendants' conduct violates the Lanham Act while simultaneously requesting the distribution of funds under the Copyright Act. The Defendants respectfully assert that receipt by the Plaintiff of the funds deposited in Court by the Defendants estopped the Plaintiff from alleging violation of the Lanham Act and constitutes an accord and satisfaction thereby resolving the last remaining issue in the case at Bar.

The Defendants respectfully assert that the Court should deny the Plaintiff's Motion to Distribute Funds or in the alternative, shall distribute same and hold that such payment constitutes an accord and satisfaction thereafter dismissing the remaining allegations of the Plaintiff's original Complaint.

Respectfully submitted,

Appendix W

s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue, 4th Floor
Nashville, TN 37203
(615) 386-9991
ATTORNEYS FOR PLAINTIFF

Appendix W

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, Tennessee 37219, this 19 day of June, 1991

s/ Alan Mark Turk
ALAN MARK TURK

APPENDIX X — ORDER DENYING MOTION TO AMEND

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, et al.

ORDER

Plaintiff's motion to amend is denied. The amendment is untimely. By scheduling order proposed jointly by the parties pursuant to Rule 16, F.R.Civ. P. and Local Rule 11 of the Court, the parties had until January 31, 1991, to amend the pleadings. This proposed amendment was not filed until June 10, 1991, over four months after the cut-off date, after all discovery is complete, only two months before the scheduled trial date.

Plaintiff asserts a Lanham Act claim in its proposed amendment. If such a claim existed, it existed in June of 1990 when this case was originally filed. Plaintiff offers no excuse or explanation for its delay in assertion of the claim until after discovery was closed, after the scheduling order deadlines for amendments has passed, and only two months before trial date.

s/ Thomas A. Wiseman Jr.
Thomas A. Wiseman, Jr.
U.S. District Judge

APPENDIX Y —DECLARATION OF JERRY FLOWERS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

SKYYWALKER RECORDS,

Defendants.

DECLARATION OF JERRY FLOWERS

Pursuant to 28 U.S.C. § 1746, I, Jerry Flowers, declare under penalty of perjury, and under the Laws of the United States of America, and of my own knowledge that:

1. I am Executive Director of Opryland Music Group, Inc., and have been employed by Opryland Music Group, Inc., since October, 1987. Acuff-Rose Music, Inc., is a wholly owned subsidiary of Opryland Music Group, Inc.

Appendix Y

2. In my capacity as Executive Director of publishing, I oversee all aspects of Opryland Music Group's publishing activities, including licensing, exploitation of copyrights, the acquisition of new writers and music publishing catalogs, royalty accountings, copyright registrations, subpublishing agreements, and generally all matters ordinarily and customarily done in music publishing.

3. Prior to joining Opryland Music Group, I was Director of Marketing for Competitive Concepts, Inc. for 2 years; Vice President of Nashville operations for the Jim Halsey Company for 4 years; Director of Artist Development for RCA Records for 5 1/2 years; and National Sales Director for ABC Records for 2 1/2 years.

4. I am also a published songwriter and I have recorded for MGM and Sussex Records. In all, I have spent nearly 21 years in a variety of positions in the music industry.

5. Music publishers like Acuff-Rose make a large investment in the creation of new songs. A music publisher supports songwriters while they compose songs for the publisher. A publisher usually pays the songwriter a non-returnable advance or salary to compose songs exclusively for the publisher. The advances are recoupable by the publisher solely from future royalties generated by recorded songs that generate royalties.

6. Acuff-Rose also usually finances the making of demonstration records ("demo's") of songs that we believe are commercially exploitable. Demo records allow artists, producers, and record companies to decide whether to record the song for commercial release. Demos cost between $250 and $1000, with an average of about $400 per song, which includes fees for musicians, vocalists, arrangers, producers, and recording studio time.

Appendix Y

7. We also employ a staff of employees: professional managers of songpluggers, who attempt to secure recordings on the song by "pitching" the song to recording artists; personnel experienced in licensing the various uses of a song; personnel experienced in accounting for royalties received by the publisher for the song; and personnel experienced in copyright protection to secure the world-wide copyright.

8. A songwriter usually assigns the copyright in his song to the publisher in exchange for half of the royalties that the publisher receives from the exploitation of the song. Recordings of the song are the principle source of royalty income; however, royalties are also earned through synchronization licenses, print licenses and performance royalties.

9. Typically, fewer than 20% of the songs in a publisher's catalog are recorded. Moreover, fewer than 4% of the songs in a publisher's catalog will ever recoup the publisher's investment in the song.

10. Unless a song is recorded, it does not generate any income. If a song is recorded as written, the record company pays the publisher a mechanical royalty at approximately the current statutory rate of 5.7 cents per record sold, less any commissions. Because a license under the compulsory licensing provisions is very burdensome to the record company, usually the license is a negotiated license.

11. Further, a compulsory license is limited to the creation of sound recordings. Any other type of license, for example a synchronization license for a video or a license for the creation of a derivative work, must be negotiated. The grant of such licenses is within the discretion of the copyright holder.

Appendix Y

12. The publisher typically pays the writer of the song 50% of the 5.7 cents and 50% of the other royalties under the copyright assignment contract. For example then, a "Gold Record," which is the industry term for a record that sells in excess of 500,000 units, grosses the publisher $28,500 in mechanical royalties, half of which the publisher pays to the writer.

13. Once a song has been recorded, it is unlikely that the song will be recorded again for a period of five to ten years. The bulk of the royalties for a song are earned in the first two years after each recording. Some songs are recorded only once having become too identified with a particular artist.

14. Acuff-Rose is required in many cases to obtain the songwriter's permission before granting any licenses for the use of the song in any commercial advertisement. Writers and publishers fear that an established song that is used in a commercial advertisement may become too associated with the commercial product or will become overexposed, resulting in fewer subsequent recordings.

15. Examples of songs that have become closely associated with commercial products are Carly Simon's "Anticipation" with Heinz Catsup and Cindy Lauper's "True Colors" that was used by Kodak. Future recordings or uses of both of these songs are doubtful due to their strong identity with a catsup bottle and a film company.

16. Thus, in order to avoid the potential foreclosure of future recording opportunities, publishers grant few commercial licenses for established songs. Should the publisher grant a commercial license, the publisher will invariably retain a right of final approval over the use of the song and any requested change of the melody or lyric.

Appendix Y

17. Parodying established hit songs and licensing those parodies have become an extremely lucrative alternate market for songs. The well-established recognizability of the hit song contributes to the success of the parody.

18. Trade publications indicate that over three million recordings aggregate have been sold of such parodies as Weird Al Yankovic's "(I'm) Fat" (based on Michael Jackson's "(I'm) Bad"); "Eat It" (based on Michael Jacksons' "Beat It"); "Like a Sturgeon" (based on Madonna's "Like a Virgin") and "I Lost on Jeopardy" (based on "Our Love's In Jeopardy").

19. A parody and the original song on which the parody is based are often played on the same radio and television stations.

20. A parody, like a commercial use, may eliminate demand for the original or future recordings of the original. A new meaning is associated with the song in the minds of the listeners. In addition, performance royalties for the original recording may be reduced, because of over-exposure to the public; once listeners hear the identical melody and structure of the original in the parody, the desire to hear the song may be satiated.

21. Performance royalties on the original song, through such organizations as ASCAP or BMI, should be paid when a parody is broadcast. However, unless the parody is properly registered by the copyright holder, the royalties due will not be paid.

22. Music publishing is based on the judicious exploitation of copyrights by publishers. Because the economic margin of proper exploitation is so tight, publishers are extremely careful in the exercise of their exclusive rights. Moreover, publishers have duties both legal and practical to the creative talent that writes the songs

Appendix Y

published. A single imprudent use could permanently decrease the value of a copyright.

23. The use made by Two Live Crew appears to be such an imprudent use. The sanctioning of that use by the Court on January 14, 1991, has been followed by an unprecedented acceleration of the erosion of the economic value of the copyright to Acuff-Rose. "Oh, Pretty Woman", previously a standard in our catalogue, is in danger of becoming infringement-proof.

24. On April 4, 1991, at 7:19 a.m., radio station WRMX-FM (96.3) broadcast a song entitled "Is That A Woman" based on Acuff-Rose's "Oh, Pretty Woman." The WRMX song incorporated the entire melody, opening guitar refrain and overall structure of "Oh, Pretty Woman." The song substituted new lyrics.

25. No license was ever requested for this unauthorized derivative work of "Oh, Pretty Woman." Upon information and belief, the song was produced and distributed nationally.

26. On or about July 25, 1991, Deja Vu, a national chain of clubs featuring strippers, aired a radio commercial spot that utilized Acuff-Rose's "Oh, Pretty Woman", with altered lyrics. No license was requested for this unauthorized commercial use.

27. On or about June 14, 1991, Peggy Lamb, Opryland Music Group's Copyright Manager, received a request from Oscar Poche of AMPM Entertainment regarding the use of "Oh, Pretty Woman" in a rap song by the group Brother Makes 3. Mr. Poche included a tape of the recording. Brother Makes 3 sampled the whole chorus section or hook of the original Roy Orbison recording of "Oh, Pretty Woman."

Appendix Y

28. Sampling is a recording technique whereby a portion of a recording can be copied or "sampled" directly, and then incorporated into a new recording. The effect of the technique is to make the sampled portion appear to be part of the new recording.

29. Peggy Lamb advised me that Mr. Poche had initially called Tom Snell of Opryland Music Group regarding the request. Mr. Poche was advised that he should send a tape copy of the Brother Makes 3 recording to Peggy Lamb's attention.

30. I was given a report that Mr. Poche had told Tom Snell that Brother Makes 3 had made two versions of their rap song incorporating "Oh, Pretty Woman." The report stated that the second version did not utilize a "sample" of the Roy Orbison recording.

31. In its continuing efforts to protect its copyrights and its exclusive right to prepare or license others to prepare derivative works based on its copyrights, Acuff-Rose denied the Brother Makes 3 requests.

32. Prior to the Court's ruling of January 14, 1991, Acuff-Rose had not experienced the type of infringements referenced in this affidavit.

FURTHER DECLARANT SAITH NOT:

DATE: September 9, 1991

s/ Jerry W. Flowers
JERRY FLOWERS

APPENDIX Z—RESPONSE TO SUPPLEMENTAL BRIEF ON DAMAGES AND NEW EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' RESPONSE TO SUPPLEMENTAL BRIEF ON DAMAGES AND NEW EVIDENCE

I. PREFACE

The Supplemental Brief filed by the Plaintiff, to which this Memorandum responds, raises two issues. The first issue is whether or not the Court should reconsider its finding that the Defendants' rendition of "Pretty Woman" is a parody of the Plaintiff's copyrighted work "Oh, Pretty Woman" and that the Defendants' version constitutes fair use under 17 U.S.C. § 107 of

the Copyright Act. The Plaintiff relies upon the declaration of Jerry Flowers in support of its Motion to Reconsider. The Defendants would state that the declaration of Jerry Flowers does not raise any new material facts in dispute upon which the Court might reconsider it's findings of fair use and granting of summary judgment. The declaration containing Mr. Flowers' unsupported conclusions is not relevant to the Court's decision that "Pretty Woman" is a parody of "Oh, Pretty Woman" and constitutes fair use. The alleged new evidence presented by the Plaintiff's Supplemental Brief does not change the Court's conclusion that as a matter of law in accordance with Rule 56 of the Federal Rules of Civil Procedure, the Defendants' parody constitutes fair use under 17 U.S.C. § 107 of the Copyright Act.

The second issue raised by the Plaintiff's Supplemental Brief is whether or not the Plaintiff is entitled to compensation by the Defendants for their fair use of "Oh, Pretty Woman" under the Copyright Act. The Plaintiff argues that if the Defendants' rendition does constitute fair use then the Plaintiff is not entitled to any damages including the funds deposited by the Defendants in accordance with Rule 67 of the Federal Rules of Civil Procedure. The Defendants acknowledge that the Plaintiff, in accordance with the Copyright Act is not entitled to compensation for the Defendants' fair use of "Oh, Pretty Woman". The Defendants respectfully request that the Court order that the funds deposited with the Court, together with interest earned thereon, be returned to the Defendants by and through their attorney, Alan Mark Turk, Attorney, P.C., in a check made payable to its escrow account.

Appendix Z

II. THE PLAINTIFF'S ALLEGED NEW EVIDENCE IS NOT RELEVANT TO THE ISSUE OF WHETHER OR NOT "PRETTY WOMAN" IS A PARODY AND CONSTITUTES FAIR USE OF "OH, PRETTY WOMAN"

The Court, in its Memorandum Opinion found as a matter of law that the Defendants' rendition of "Pretty Woman" constituted fair use of the Plaintiff's copyrighted work "Oh, Pretty Woman". The determination of whether or not a particular parody constitutes fair use is a mixed question of law and fact. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985). The Court, in its Memorandum Opinion, stated that:

> Based on the evidence presented by the parties in this case, including copies of the songs, correspondence and affidavits, whether the defendant's parody constitutes fair use under 17 U.S.C. § 107 is a question of law for the Court to determine.

(Memorandum, p. 5)

The declaration of Jerry Flowers creates no material facts in dispute upon which the Court should reconsider its conclusion that the Defendants' rendition of "Pretty Woman" constitutes fair use of "Oh, Pretty Woman".

Section 107 of the Copyright Act instructs courts to balance the following four factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

Appendix Z

> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107

The Court, in its Memorandum Opinion, reviewed each of these four factors in detail and reached the conclusion that the Defendants' use did not constitute infringement but rather fair use. (Memorandum Opinion, pages 4 through 16) The declaration of Jerry Flowers adds no new material facts upon which the Court should reconsider its determination. The declaration of Jerry Flowers does not change the purpose and character of the Defendants' use; does not change the nature of the copyrighted work; does not change the amount of quotation utilized by the defendants; and does not change the effect of the defendants' use in the marketplace. The declaration of Mr. Flowers alleges subsequent infringements by third parties and speculates that such infringements were proximately caused by the Court's Order of January 14, 1991. This argument is ridiculous. The fourth factor of the fair use analysis, as set forth in 17 U.S.C. § 107, relates to the effect the Defendants' use has on the Plaintiff's copyrighted work in the marketplace and not on the conduct of any third parties. The question of whether or not the use by these third parties of the Plaintiff's copyrighted work constitute infringement and/or fair use is not relevant to the issue as to whether or not the Defendants' version constitutes infringement and/or fair use. The determination of fair use is on a case by case basis. *Harper & Row Publishing, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

Appendix Z

III. THE DEFENDANTS ARE ENTITLED TO THE RETURN OF THE DEPOSITED FUNDS TOGETHER WITH INTEREST THEREON

The Defendants, in accordance with Rule 67 of the Federal Rules of Civil Procedure deposited with the Court certain funds to compensate the Plaintiff for their use of "Oh, Pretty Woman". At the time of the deposit, the Court had not yet ruled that the Defendants' use constituted fair use under the Copyright Act. Therefore, the deposit by the Defendants was in the amount that would have been owed by the Defendants to the Plaintiff if the Defendants' version had been held a derivative work under the Compulsory License Division of the Copyright Act, 17 U.S.C. § 115.

The Court, in its Memorandum Opinion, specifically stated that "this decision does not address whether the sum reflects adequate compliance with the Act." (Memorandum Opinion, page 3) The Defendants initially moved for the Court to order the payment of these deposited funds to the Plaintiff. The Defendants objected to the payment of these deposited funds to the Plaintiff. The Plaintiff now argues that if the Defendants' rendition of "Pretty Woman" constitutes fair use of its copyrighted work "Oh, Pretty Woman" then no monetary compensation is owed by the Defendants. The fair use provisions of the Copyright Act, 17 U.S.C § 107, make no reference to compensation for such fair use. The Defendants acknowledge that the Compulsory License provision of the Copyright Act, 17 U.S.C. § 115 is not applicable to fair use. Therefore, in light of the Court's Order of January 14, 1991, no compensation is owed by the Defendants to the Plaintiff. Therefore, the Court should order the return of the funds deposited by the Defendants and interest earned thereon. The return of these funds to the Defendants by Court Order would resolve the only

Appendix Z

issue not addressed by the Court's Order of January 14, 1991. Upon the return of the deposited funds, the Plaintiff could then, in accordance with the Appellate Rules of Civil Procedure, file a Notice of Appeal with the Sixth Circuit appealing the Court's Order of January 14, 1991. This is anticipated by the parties and the Court. The return of the deposited funds would remove the only remaining pre-condition to the filing of such appeal.

CONCLUSION

The alleged new evidence raised by the Plaintiff in the declaration of Jerry Flowers is not relevant and does not form a basis for the Court to reconsider its Order of January 14, 1991. Further, the Court should order the return of the funds deposited and interest thereon.

Respectfully submitted.

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

Appendix Z

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to R. Eddied Wayland, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 20 day of September, 1991.

s/ Alan Turk

ALAN MARK TURK

APPENDIX AA — ORDER CONFIRMING SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

Luther R. Campbell a/k/a Luke Skyywalker, Christopher Wongwon a/k/a Fresh Kid Ice, Mark Ross a/k/a Brother Marquis, David Hobbs a/k/a Mr. Mixx, p/k/a The 2 Live Crew

and

Skyywalker Records,

Defendants.

ORDER

In accordance with the Court's January 14, 1992 Order finding that the Defendants' musical parody is protected under the fair use doctrine, the Court hereby ORDERS that the sum total of the funds and interest deposited with the Court pursuant to Fed. R. Civ. P. 67 be returned to the Defendants.

This is a final order in the case from which an appeal of right lies.

IT IS SO ORDERED.

Appendix AA

s/ Thomas A. Wiseman, Jr.
Thomas A Wiseman, Jr.
U.S. District Judge

APPENDIX BB — ORDER TO DISTRIBUTE FUNDS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW,

and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION

Come now the Defendants and move for the Court to amend its Order entered September 30, 1991, to reflect that the funds and any interest thereon deposited with the Court by the Defendants be payable to Alan Mark Turk, Attorney, P.C., Trust Account to be distributed as follows: $5,000.00 shall be paid to Alan Mark Turk, Attorney, P.C., the balance of the funds shall be paid to Skyywalker Records.

Appendix BB

Respectfully submitted,

s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue, 4th Floor
Nashville, TN 37203
(615) 386-9991
ATTORNEYS FOR PLAINTIFF

[Handwritten]
GRANTED
s/ TA Wiseman
TA Wiseman, Judge

APPENDIX CC — NOTICE OF APPEAL FILED OCTOBER 15, 1991

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

NOTICE OF APPEAL
JUDGE WISEMAN
Case No. 3:90-0524

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Acuff-Rose, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit the final Order entered in this action on the 2nd day of October, 1991, confirming the grant of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and distributing interpled funds.

Dated: October 14, 1991.

Appendix CC

Respectfully submitted,

KING & BALLOW
s/ R. Eddie Wayland
R. Eddie Wayland
Nora T. Cannon
E. Andrew Norwood
Francis J. Del Casino

Counsel for Appellant

1200 Noel Place
200 Fourth Avenue North
Nashville, Tennessee 37219
615/259-3456

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was duly served, via U.S. Mail, postage prepaid, this 14th day of October, 1991, addressed as follows:

Alan M. Turk, Esquire
Fourth Floor
3310 West End Avenue
Nashville, Tennessee 37203

Sanford R. Ross, Esquire
Fourth Floor
3310 West End Avenue
Nashville, Tennessee 37203

Appendix CC

Alan Jacobi, Esquire
1313-125th Street, NE
North Miami, Florida 33161

s/ R. Eddie Wayland

APPENDIX DD — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 17, 1992

No. 91-6225

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant,

v.

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER; CHRISTOPHER WONGWON, a/k/a FRESH KID ICE; MARK ROSS, a/k/a BROTHER MARQUIS; DAVID HOBBS, a/k/a MR. MIXX; professionally known as 2 LIVE CREW; LUKE SKYYWALKER RECORDS,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Middle District of Tennessee

---

Decided and Filed August 17, 1992

Before: NELSON and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

---

*Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

Appendix DD

JOINER, Senior District Judge, delivered the opinion of the court, in which NORRIS, Circuit Judge, joined. NELSON, Circuit Judge (pp. 19-34), delivered a separate dissenting opinion.

CHARLES W. JOINER, Senior District Judge. In this copyright case, plaintiff appeals summary judgment granted to defendants. The district court held that defendants' use of a song owned by plaintiff was a parody and therefore constituted a fair use of copyrighted material under section 107 of the Copyright Act, 17 U.S.C. § 101 *et seq.*

The 2 Live Crew, a rap music group, released for commercial distribution a version of Acuff-Rose Music's copyrighted song, "Oh, Pretty Woman." Acuff-Rose sued The 2 Live Crew, its individual members and its record company for copyright infringement and alleged pendent state law claims of interference with business relations and interference with prospective business advantage. Defendants filed a motion for dismissal, which was treated as a motion for summary judgment. The district court granted summary judgment, holding that The 2 Live Crew had created a parody and that the parody was a non-infringing "fair use" of the song as defined by section 107 of the 1976 Copyright Act. 17 U.S.C. § 107. We reverse.

I.

"Oh, Pretty Woman" was written and recorded by Roy Orbison and William Dees in 1964. Rights to the song were assigned to Acuff-Rose that same year, and Acuff-Rose registered for copyright protection. The song has become a pop music standard, and Acuff-Rose has realized substantial income from the licensing of "cover" recordings and other derivative works.

Luther Campbell, lead vocalist and song writer of The 2 Live Crew (2 Live Crew), wrote a version of "Oh, Pretty Woman" in May 1989, which he entitled "Pretty

Woman." By affidavit, Campbell stated that he had intended to create a parody as an attempt "through comical lyrics, to satirize the original work . . . ." In June 1989, Campbell's company, Luke Records (then doing business as Skyywalker Records), released "Pretty Woman" as one of ten tracks on a collection entitled "As Clean As They Wanna Be." The credits on the album[1] recognize Orbison and Dees as the writers of "Pretty Woman," and Acuff-Rose as publisher of the song.

On July 5, 1989, following release of the album, Linda Fine, general manager of Luke Records, wrote a letter to Gerald Tiefer of Opryland Music Group (of which Acuff-Rose is a part) to "inform [Tiefer] of 'Two Live Crew's' desire to do a parody" of "Oh, Pretty Woman."[2] Fine stressed that a parody was intended and that the popularity of 2 Live Crew ensured substantial sales:

> At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain [sic] to what Weird Al Yankovic and other satirical artists are doing.
>
> We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

[1]We use the term "album" generically; "As Clean As They Wanna Be" was also released on compact disc and cassette tape.

[2]The parties dispute the above chronology. Defendants contend that Campbell intended all along to create a comic song and appropriately sought the permission of Acuff-Rose prior to doing so. Acuff-Rose sees Fine's letter as a effort to create a revisionist history of legitimacy for an act of piracy. The district court found that "As Clean As They Wanna Be" was released on July 15, 1989, subsequent to Fine's letter to Tiefer. Campbell's intent is not dispositive of the case, but we note that this finding contradicts Campbell's affidavit. The only support in the record for a July 15 release date is found in Acuff-Rose's response to the motion for dismissal, in which counsel asserted a release date "on or about July 15, 1989." Campbell's affidavit is a better factual source than counsel's contention.

> Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Fine included a cassette tape of 2 Live Crew's version of the song and a lyric sheet for Tiefer to consider.

Tiefer responded tersely: "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" This refusal to grant a license did not dissuade 2 Live Crew from continuing to sell "As Clean As They Wanna Be."

Acuff-Rose brought suit in June 1990 and defendants responded by filing a motion to dismiss, accompanied by affidavits, and sought to deposit $13,867.56. This amount was apparently calculated after reference to statutory royalty rates established by the Copyright Act, and reflected defendants' understanding of what was owed to Acuff-Rose for use of the copyrighted song. The district court ordered the funds deposited with the Clerk of Court.[3] Acuff-Rose responded with affidavits, which the district court relied upon when granting summary judgment.

[3]At oral argument, counsel for 2 Live Crew stated that the deposit was a tactical mistake which should not be construed as an admission that the group's song was something other than a fair use parody. Our review of the record reveals confusion over the status of "Pretty Woman" as either a "comic" effort, such as those created by comic musician Weird Al Yankovic, or a "parody," which purports to deliver social commentary within a humorous framework. Yankovic's works are licensed uses, not "fair uses" for which a license is not required. This confusion on the part of 2 Live Crew adds weight to Acuff-Rose's assertion that Campbell's intent to create a parody was only formed after "Pretty Woman" was released.

Among the affidavits presented, defendants presented that of Oscar Brand.[4] Brand, who has himself recorded a number of songs which he terms "parodies," stated his opinion that "both the words and the music of the 2 Live Crew performance are classic parodies." Brand dissected the two songs and found substantial similarities of musical structure between them. The 2 Live Crew version has the same 4/4 drum beat as the original and includes a "very recognizable 'bass riff,'" which "is repeated *eight times* . . . ." However, the 2 Live Crew version diverges from the original by following the recognizable riff with "an atypical scraper -- a Latin musical device, quite antithetic to the Orbison musical styling." Further, in the 2 Live Crew version, the lead vocalist sings (or raps) "in the key of B major, which, performed against the A major chorus, gives the song a comic aspect."

Lyrically, Brand found "Pretty Woman" to be consistent with a long tradition in the United States of making social commentary through music. African-American rap music, Brand stated, uses parody as a form of protest, and often substitutes new words to "make fun of the 'white-bread' originals and the establishment . . . ." In "Pretty Woman," Brand concluded, "this anti-establishment singing group is trying to show how bland and banal the Orbison song seems to them. It's just one of many examples of their derisive approach to 'white-centered' popular music."

Acuff-Rose presented the affidavit of Ph.D. musicologist Earl V. Speilman. Speilman also examined and compared the two songs and determined that there is "a significant amount of similarity" between them. Speilman identified five specific similarities, including the repetition of the recognizable riff, which "may have actually been sampled or lifted and then incorporated into the recording of 'Pretty Woman' as performed by The 2

[4] 2 Live Crew also presented the affidavit of M. William Krasilovsky, whose conclusions and the reasons therefore are much the same as Brand's.

Live Crew." Speilman concluded that even a listener without musical training would readily discern that "Pretty Woman" was modelled after "Oh, Pretty Woman."

The district court determined that there were no genuine issues of fact material to the question of fair use in dispute, and that the case was therefore suitable for summary judgment. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1153 (M.D. Tenn. 1991). The court then analyzed the factors by which an alleged infringing use is tested for fairness under section 107 of the Act. *Id.* at 1154-59.[5]

Following the district court's determination that "Pretty Woman" was a parody, Acuff-Rose filed motions to distribute the funds deposited by 2 Live Crew with the Clerk of Court, and sought reconsideration of the fair use determination by introducing additional evidence on the question of the impact of the parody upon the market value of the copyrighted original.[6] Based upon its determination of fair use, the district court granted summary judgment and ordered the funds returned to 2 Live Crew.

II.

We review the district court's grant of summary judgment *de novo*. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is appropriate if the non-moving party fails to establish a genuine issue of material fact on an element essential to its case and on which it would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322

[5] The district court also determined that Acuff-Rose's pendent state law claims were preempted by section 301 of the Copyright Act. *Acuff-Rose Music*, 754 F. Supp. at 1159-60. Acuff-Rose does not challenge this determination.

[6] Acuff-Rose also sought leave to amend its complaint to allege violations of the Lanham Act. 15 U.S.C. § 1125(a). The district court denied the motion and Acuff-Rose does not allege error in the denial.

(1986). In making that determination, we view the evidence in the record in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

These general principles apply to the question of fair use, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1257-58 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987), which is a mixed question of law and fact. *Matthews Conveyor Co. v. Palmer Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 560 (1985). In reviewing the district court's determination of fair use, when that court has found facts sufficient to evaluate each of the factors enumerated in section 107 of the Copyright Act, we "'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work.'" *Harper & Row*, 471 U.S. at 560 (quoting *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984)). Our review of the record shows that no material facts are in dispute. The parties dispute the ultimate conclusions to be drawn from the facts. These judgments are legal in nature.

III.

Section 102(a) of the Copyright Act, adopted under the express authority of Section 8 of the United States Constitution granting Congress the power to give authors exclusive rights to their writings, protects "musical works, including any accompanying words." 17 U.S.C. § 102(a)(2). Section 106 of the Act grants to the copyright holder a variety of exclusive rights in the copyrighted work, including the right to "reproduce the copyrighted work in copies or phonorecords," and to "prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(1) and (2). The words and music to plaintiff's song "Oh Pretty Woman" are subject to these protections. However, plaintiff's exclusive rights are also subject to the provisions of sections 107 through

118 of the Act, which create exemptions and limitations on the owner's rights.

Section 107 of the Copyright Act states:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. In this case 2 Live Crew defends against a charge of copyright infringement by arguing that "Pretty Woman" falls within the exceptions spelled out in section 107.

In determining the scope and extent of the exceptions and limitations to copyright protection carved out by section 107, it is important to focus on the plain language of that section and the directions implicit in its form.

Section 107 takes from a copyright owner the exclusive rights to his work insofar as a derivative, or allegedly infringing work, is a "fair use" of the copyrighted work. Traditionally, fair use is defined as "'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'" *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property*, 260 (1944)). Fair use is an "equitable rule of reason," *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984), which is used in order to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir 1980)). Fair use is the only exception to a copyright holder's exclusive rights in his work, but section 107 explains that the overarching concept of fair use embraces use of a copyrighted work for the purpose of "criticism, comment, news reporting, teaching, scholarship, or research."

As the jurisprudence of section 107 has developed, the courts have found that the section's recognition of "comment" and "criticism" as species of fair use also, by practical extension of those terms, includes the use of a copyrighted work (or a portion thereof) as a parody or satire of that work. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992). Indeed, the fair use formulation found in section 107 is a reflection of Congress's intent to codify the common law fair use doctrine,[7] which has long included parody. *Harper & Row*, 471 U.S. at 549; see also *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903) (a parody fair use involving vaudeville impersonations). Therefore, it is understandable that both the parties and the district court focus on parody in their analyses of fair use. However, because the text of section 107 lists specific fair uses, we find that the term parody

[7]*See*, S. Rep. No. 94-473, 94th Cong., 1st Sess. at 61-62 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 65 (1976).

must be either subsumed within the statutory terms "criticism" or "comment," or be an entirely separate category of exception.

Unfortunately, the terminology of the fair use analysis has evolved in such a way that the popular definition of parody and the statutory definition of parody as a form of criticism have become somewhat confused. Popularly, the term parody may be described as "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new artwork that makes ridiculous the style and expression of the original." *Rogers*, 960 F.2d at 309-10. This popular definition has been used on occasion as a synonym for that which is necessary to create an exception to the exclusive rights in a copyrighted work. This use, we find, creates confusion and should be avoided. Much of entertainment involves parodies in the popular sense, but section 107 does not direct the courts to conclude that all such parodies are fair uses. For the purposes of this opinion, we will assume, as found by the district court, that 2 Live Crew's song is a parody of Acuff-Rose's copyrighted song, and proceed to determine whether the calculus of section 107 results in a determination of fair use. That determination requires careful application of the four statutory factors. *Harper & Row*, 471 U.S. at 549; 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-82.1. Although the question of fair use in the context of musical works is one of first impression in this circuit, we do not write on a clean slate.

Purpose and Character of Use

We look first to the purpose and character of the use of Acuff-Rose's song by 2 Live Crew. We accept the district court's conclusion that the purpose of the use was to parody the original.[8] We consider the character of the

[8]We do so with considerable reservation, as the district court's parody analysis does not, in our view, comport with proper analysis of that term.

The district court compared the statement of the parties' affiants and concluded: "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody." *Acuff Rose*, 754 F. Supp. at 1155. The district court closely parsed the lyrics of the two songs, finding that: "Although the parody starts out with the same lyrics as the original, it quickly degenerates into a play on words, substituting predictable lyrics with shocking ones." *Id.* 2 Live Crew contends that by way of the "shocking" lyrics "Pretty Woman" was intended to satirize the original work, as well as society at large. Our difficulty with the district court's conclusion that this intention was realized is that, even accepting that "Pretty Woman" is a comment on the banality of white-centered popular music, we cannot discern any parody of the original song. Failing a direct comment on the original, there can be no parody, as the "copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work." *Rogers*, 960 F.2d at 310 (citing *MCA, Inc.*, 677 F.2d at 185).

In the copyrighted song, the singer remarks on the beauty of a woman he sees on the street. The singer is initially disappointed when the woman rebuffs his advances and later exults when the woman appears to change her mind. Campbell's lyrics involved women but aside from broadly evoking the theme of the original in the opening line of the 2 Live Crew version: "Pretty Woman -- Walkin' down the street, Pretty Woman -- Girl you look so sweet," bear no discernible relationship to the original. Instead, as Brand noted, the lyrics examine a series of women with unappealing attributes: "Big Hairy Woman -- You need to shave that stuff, Big Hairy Woman -- You know I bet it's tough, Big Hairy Woman -- All that hair it ain't legit, 'Cause you look like 'cousin it,' Big Hairy Woman," or who are not faithful: "Two Timin' Woman -- Girl you know you ain't right, Two Timin' Woman -- You's out with my boy last night, Two Timin' Woman -- That takes a load off my mind, Two Timin' Woman -- Now I know the baby ain't mine."

In our opinion, this is not a new work which makes ridiculous the style and expression of the original, although there is plainly an element of the ridiculous to the new work. We cannot see any thematic relationship between the copyrighted song and the alleged parody. The mere fact that both songs have a woman as their central theme is too tenuous a connection to be viewed as critical comment on the original. We find instructive the holding in *Elesmere v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980). The Court of Appeals for the Second Circuit agreed with the district court that the company of the television program "Saturday Night Live" had performed a parody -- entitled "I Love Sodom" -- of the then-widely known advertising jingle "I Love New York." The new work cast the original image-polishing effort as ridiculous by asserting that the effort to redeem New York City's image was futile. It is this sort of direct comment, comment which is expressly and unambiguously directed at the message of the original work, which constitutes a parody. Similarly, the court in *Rogers* found that a sculpture based upon a copyrighted

use separately. The use of a copyrighted work primarily for commercial purposes has been held by the Supreme Court to be presumptively unfair. *Sony Corp.*, 464 U.S. 417, 449 (1984). "While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain." *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981). The Supreme Court explained that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562.

In the instant case, the district court found, and we agree, that "2 Live Crew's song is included on a commercially distributed album sold for the purpose of making a profit," and that "2 Live Crew's primary goal in releasing 'As Clean As They Wanna Be' is to sell its music . . . ." 754 F. Supp. at 1154. However, the district court saw the Supreme Court's holdings in *Sony Corp.* and *Harper & Row* regarding the presumptively unfair nature of a commercial purpose as "merely 'tend[ing] to weigh against a finding of fair use.'" *Id.* (quoting *Harper & Row*, 471 U.S. at 562). We agree that commercial purpose is not itself controlling on the issue of fair use, but find that the district court placed insufficient emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holding that "'[E]very commercial use of copyrighted material is presumptively an unfair

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photograph was not a parody regardless of the creator's alleged intention to point out the banality of the copyrighted work. *Rogers*, 960 F.2d at 309-10. The new work, the court found, could perhaps be seen as a critique of materialistic society at large, but on its face the sculpture failed to make critical comment regarding the original creative work. *Id.* We are in agreement with the *Rogers* court that the term parody cannot be allowed to assume too broad a definition, for if an "infringement of a copyrightable expression could be justified as a fair use solely on the basis of the infringer's claim to a higher or different artistic use . . . there would be no practicable boundary to the fair use defense." *Id.* at 310.

exploitation of the monopoly privilege that belongs to the owner of the copyright.'" 471 U.S. at 562 (quoting *Sony Corp.*, 464 U.S. at 451). Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair. We are asked to then consider whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the "parody does not unfairly diminish the economic value of the original." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

Although in this case we do not set aside the district court's conclusion that 2 Live Crew's song is a criticism in the nature of a parody in the popular sense, we nevertheless find that the district court erred in the process of determining that the criticism constituted a fair use of the copyrighted work. We find that the admittedly commercial nature of the derivative work -- the *purpose* of the work being no less important than its *character* in the Act's formulation -- requires the conclusion that the first factor weighs against a finding of fair use. *Sony Corp.*, 464 U.S. at 449.

Nature of Copyrighted Work

The district court found that this factor weighed against a determination of fair use, and we agree. *Acuff-Rose*, 754 F. Supp at 1155-56. As a general rule, creative works -- literary works of fiction or artistic works -- are afforded greater protection from the fair use determination than are works of fact. *Harper & Row*, 471 U.S. at 563; *New Era Publications, Int'l v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 297 (1990). The status of "Oh, Pretty Woman" as a creative work is not contested. In determining whether this factor should weigh in favor of the copyright holder we also ask whether the work "represented a substantial investment of time and labor made in anticipation of financial return." *MCA, Inc.*, 677

F.2d at 182. The record amply supports a finding in favor of Acuff-Rose on this factor.

Portion Used

The third factor we consider is the amount and substantiality of the portion of the copyrighted work used in the derivative work in relation to the copyrighted work as a whole. As applied to alleged parodies, this factor has historically turned on analysis of the "conjure up" test. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied sub nom.*, *O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979). The test asks "whether the parodist has appropriated a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire." *Id.* The test describes a continuum of use, and not only scrutinizes the extent of the taking, but the qualitative nature of that taking. *Harper & Row*, 471 U.S. at 565. A *de minimis* use, one that is meager and fragmentary, by definition fails to conjure up the original and does not constitute an infringement. *Elesmere*, 482 F. Supp. at 744. The 2 Live Crew, appropriately, does not attempt to characterize its use of the copyrighted work as *de minimis*. Uses which depart from the *de minimis* level may nevertheless be fair uses, but at some point on the continuum this factor militates against a finding of fair use. *Air Pirates*, 581 F.2d at 757. Parodies are generally allowed to use more of the copyrighted work and still fall within the rubric of fair use than are other types of copying:

> [T]he concept of 'conjuring up' an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to 'conjure up' the original.

Elesmere, 623 F.2d at 253, n.1 (citation omitted).

The district court, having found that 2 Live Crew created a parody in the popular sense, applied the conjure up test. The amount of the original work which is appropriated is a factual issue, but the question whether the taking is excessive under the circumstances is one of law. *Fisher*, 794 F.2d at 438, n.4.

The district court, operating on the assumption that "Pretty Woman" is a parody, concluded: "In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose." *Acuff-Rose*, 754 F. Supp. at 1157. Clearly, the court was using the term parody in its popular sense. While it may not be inappropriate to find that no more was taken than necessary, the copying was qualitatively substantial. Both of defendants' affiants stated that 2 Live Crew's version tracks the music and meter of the original. These opinions were intended to demonstrate that the new song is a parody. However, these opinions point out the substantiality of copying. Near verbatim taking of the music and meter of a copyrighted work without the creation of a parody is excessive taking. *See MCA, Inc.*, 677 F.2d at 183-85. Most importantly, defendants' affiants stated that the song is built upon the recognizable bass or guitar riff of the original by repeating that riff eight times. Acuff-Rose's musicologist stated that the riff was probably sampled from the original, that is, simply recorded verbatim and then mixed with 2 Live Crew's additions. "[T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression." *Harper & Row*, 471 U.S. at 565. The qualitative degree of the copying is even more critical than the quantitative, and we ask what degree of the essence of the original is copied in relation to its whole. *See Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.), *reh'g denied*, 818 F.2d 252, *cert. denied*, 484 U.S. 890 (1987). We

conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original. The facts as developed under this factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" cannot be used in any way to support a finding of fair use.

Effect on Potential Market

This factor has been characterized as "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566; *see also Stewart*, 495 U.S. at 238. This factor requires that a balance be struck "between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair." *Rogers*, 960 F.2d at 311. To demonstrate that the balance weighs in favor of a finding of no fair use:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

Sony Corp., 464 U.S. at 451 (emphasis in original). The focus is on *potential* harm, and the "inquiry must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, 471 U.S. at 568.

In the instant case, the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists. *See Rogers*, 960

F.2d at 312 (the court holding that "there is simply nothing in the record to support a view that [defendant] produced [the derivative art work] for anything other than sale as high-priced art. Hence, the likelihood of future harm to [plaintiff's] photograph is presumed, and plaintiff's market for his work has been prejudiced").

Having determined that 2 Live Crew created a parody, the district court refused to indulge the presumption and concluded that "it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original" because the "intended audience for the two songs is entirely different." *Acuff-Rose*, 754 F. Supp. at 1158. In reaching this conclusion, the district court largely relied on the affidavit of Krasilovsky who stated, in part: "I cannot see how it [the new work] can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." *Id.* Although we have already determined that harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses, we note that inquiry under the fourth statutory factor not only considers harm to the market for the original but harm to the market for derivative works as well. *Id.* This formulation was arrived at by Professor Nimmer, who provided an example relied upon by the *Rogers* court: "[A] movie adaptation is made of a book. Even though the movie may boost book sales, it is an unfair use because of the effect on the potential sale of adaptation rights." *Rogers*, 960 F.2d at 312 (citing 3 Nimmer, § 13.05[B]). Krasilovsky's statement is irrelevant as to the fourth statutory factor. The record on this factor does not support a finding of fair use.

Conclusion

Three of the factors set out in the statute weigh against a finding of fair use. One is, at best, neutral. In dealing with uses popularly termed parodies, the factors involving the commercial nature of the use and the damage to the defendant are of particular significance. It is likely, for example, that an identical use of the copyrighted work in

this case at a private gathering on a not-for-profit basis would be a fair use. It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use.

We conclude that the district court erred in granting summary judgment to defendants. The four factors set forth in section 107 of the Act support the conclusion that 2 Live Crew's use of Acuff-Rose's copyrighted song was not a fair use. We **REVERSE** and **REMAND** for proceedings consistent with this opinion.

Appendix DD

DAVID A. NELSON, Circuit Judge, dissenting. A Second Circuit panel that included both of the cousins Hand once called the "fair use" issue "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). It has been said, indeed, that the fair use doctrine "is so flexible as virtually to defy definition." *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 144 (S.D.N.Y. 1968).

Perhaps the most troublesome fair use issue of all is the question of whether a particular parody constitutes fair use of a copyrighted original. The parody cases appear to be in hopeless conflict. Compare, for example, *Loew's, Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958) (Jack Benny's parody of the motion picture "Gaslight" held not to be fair use of the original), with *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (Mad Magazine parodies of Irving Berlin songs held to be fair use).[1] *Cf. Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348 (S.D. Cal. 1955), where the same district judge who rejected the fair use defense for Jack Benny's parody of "Gaslight" accepted the defense for a Sid Caesar parody of "From Here to Eternity." In sum, whether a particular parody is entitled to the protection of the fair use doctrine is a question likely to be dealt with by lower courts in much the same way that the Supreme Court deals with more than a few

[1]As *Berlin* points out, 329 F.2d at 544-45, *Loew's* has been widely criticized. Among the critics is no less a figure than Professor (later Justice) Benjamin Kaplan. See Kaplan, *An Unhurried View of Copyright* (1967) at 69. The Ninth Circuit has said that its *Loew's* decision "was essentially repudiated by Congress's recognition of parody in the notes to the Copyrights Act of 1976." *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986), citing 17 U.S.C.A § 107 Historical Note. (The Note quotes House Report No. 94-1476 as listing "use in a parody of some of the content of the work parodied" as among "the sort of activities the courts might regard as fair use under the circumstances.")

Appendix DD

questions of constitutional law; we think we know fair use when we see it, even if we cannot do a very good job of relating what we see (or do not see) to the governing text.

The text that is pertinent here is statutory, not constitutional.[2] Where parody is concerned, however, the guidance provided by the statute is at least as Delphic as that sometimes provided by the Constitution. The Copyright Act says that "the fair use of a copyrighted work . . . for purposes *such as* criticism, comment . . . scholarship or research, is not an infringement of copyright." 17 U.S.C. § 107 (emphasis supplied). (The statute itself tells us that the words "such as" mean what they say and "are illustrative and not limitative." 17 U.S.C. § 101.) The statute then goes on to list four factors that shall be "include[d]" among the factors considered by a court in determining a question of fair use: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include* [the four factors.]" Section 107 (emphasis supplied). Here again, the list provided by Congress is "nonexclusive," to borrow the term used in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,

[2]There are, to be sure, authorities who would constitutionalize copyright law. Some would treat satire as sacrosanct under the First Amendment. See, *e.g.*, Goetsch, "Parody as Free Speech -- The Replacement of the Fair Use Doctrine By First Amendment Protection," 3 W. New Eng. L. Rev. 39 (1980). Others would accord constitutional protection to any parody a limitation on which would, in the opinion of the judge, impede "the Progress of Science" as that phrase is used in the Copyright Clause, Art. I, § 8 of the Constitution. See Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act," ASCAP Copyright Law Symposium No. 34 (1987) at 23. As for me, I cannot work up much enthusiasm for turning every copyright case into a mini-*Marbury v. Madison* or *New York Times Co. v. Sullivan*. The major role in determining how to promote the progress of science has been given, after all, to Congress: "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors. . . ." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The Ninth Circuit has rejected out of hand the notion that the First Amendment gives parodists a blanket protection from copyright infringement actions. *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

471 U.S. 539, 549 (1985); the court is free to consider any other factors that may be relevant.

Where we are dealing with parody, as I shall suggest, unenumerated factors may have no less relevance than the four set forth in the statute -- and the statutory factors are likely to have a somewhat different impact on our deliberations than they would in a non-parody situation. Before turning to these matters, however, I think it would be helpful to consider what it is we are talking about when we speak of "parody."

The etymology of the word has direct relevance to this case. The term comes from the Greek *parodeia*, meaning "a song sung alongside another."[3] The musical parody is thus the very archetype of the genre.

One of the best definitions I have come across is the following, which appears in a prize-winning student essay:

> "A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic [or, I would add, for satiric] effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable." *Clemmons*, "Author v. Parodist: Striking a Compromise," ASCAP Copyright Law Symposium No. 33 (1987) at 101.[4]

[3]VII Encyclopedia Britannica (15th ed. 1975) at 768. "*Parodeia*" joins the Greek words for "beside" and "to sing" -- the roots of our prefix "para" and our word for a lyric poem, "ode." Webster's New International Dictionary (3d ed. 1961).

[4]See also Note, "The Parody Defense to Copyright Infringement: Productive Fair Use After *Betamax*," 97 Harv. L. Rev. 1395 (1984): "Parody, in its purest form, is the art of creating a new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of an original." The examples cited by the Harvard editors are Cervantes' *Don Quixote* (1614), Pope's *The Rape of the Lock* (1712), and Austen's *Northanger Abbey* (1818), all of which parodied then-popular literary genres. Judge Yankwich provides a much longer list of well known parodies in his article "Parody and Burlesque in the Law of Copyright," 33 Can. B. Rev. 1131 (1955). The art form goes back at least as far as Aristophines, the famous comic dramatist of ancient Greece, whose play *The Frogs* (405 B.C.) -- a work still performed today -- spoofed the plays of Aeschylus and Euripides.

Parodies often outlast and outshine the works parodied. A good example is Lewis Carroll's "You Are Old, Father William," a takeoff on Southey's work "The Old Man's Comforts." The texts, which are strikingly similar in form, may be read side-by-side in the appendix to Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act," ASCAP Copyright Law Symposium No. 34 (1987) at 37-38.

Some authorities go on to suggest that if the derivative work is to be treated as true parody, it must do more than achieve a comic effect: "It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist -- thereby giving the parody social value beyond its entertainment function." *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F.Supp. 351, 357 (N.D. Ga. 1979); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F.Supp. 1517, 1525 (S.D.N.Y. 1988). See also Faaland, "Parody and Fair Use: The Critical Question," 57 Wash. L. Rev. 163 (1981); Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act," ASCAP Copyright Law Symposium No. 34, (1987). But whether or not a derivative work must "criticize" the original, I am not sure that I understand the reservations my colleagues on the panel have expressed in this case about accepting the district court's conclusion that 2 Live Crew's "Pretty Woman" is in fact a parody of the Acuff-Rose original. Under anyone's definition, it seems to me, the 2 Live Crew song is a quintessential parody.

The Second Circuit faced a similar definitional question in *Berlin v. E.C. Publications Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). One of the Irving Berlin pieces on which the Mad Magazine people had worked their peculiar magic was the song "A Pretty

Girl is Like a Melody." (Messrs. Orbison and Dees are obviously not the first tunesmiths to have turned their attention to a comely female.) The defendants, in the words of the court,

> "transformed the plaintiffs' 'A Pretty Girl Is Like a Melody,' into 'Louella Schwartz Describes Her Malady'; what was originally a tribute to feminine beauty became a burlesque of a feminine hypochondriac troubled with sleeplessness and a propensity to tell the world of her plight." *Id.* at 543.

This was "parody," the Second Circuit said -- and it was parody that constituted fair use of Irving Berlin's original work:

> "For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' 'Don Quixote' and Swift's 'Gulliver's Travels,' or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest." *Id.* at 545.

In *Fisher v. Dees*, 794 F.2d 434 (9th Cir. 1986), similarly, the Ninth Circuit had occasion to analyze a pair of songs about women named "Sunny" or "Sonny." The first piece, recorded in the 1950s by Johnny Mathis, was entitled "When Sunny Gets Blue." The second, released in 1985 under the title "When Sonny Sniffs Glue," copied the first six bars (the recognizable main theme) of the original song's 38 bars. The derivative work transformed the original opening lyrics -- "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall" -- into "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." *Id.* at 434. After listening to tapes of both songs, the Ninth Circuit panel had no difficulty at all in rejecting an argument that "the so-called parody is not actually a parody, or at least is not

a parody of the composer's song." *Id.* at 436. Said the court,

> "Although we have no illusions of musical expertise, it was clear to us that Dees's version was intended to poke fun at the composers' song, and at Mr. Mathis's rather singular vocal range. We reject the notion that the song was used merely as a vehicle to achieve a comedic objective unrelated to the song, its place and time." *Id.*

Like the Second Circuit panel in *Berlin*, the *Fisher* court affirmed a finding that the parody was entitled to fair use protection as a matter of law. *Id.* at 440.

I myself have no more "illusions of musical expertise" than did the members of the court that decided *Fisher v. Dees*. After listening, however, to Exhibits D and E, the tapes of the two "Pretty Woman" songs, I am satisfied that the 2 Live Crew version both imitates and distorts the original work for comic or satiric effect, and does so in such a way that both the original work and the work of the parodist are readily recognizable. The parody (done in an African-American dialect) was clearly intended to ridicule the white-bread original -- and if a higher criticism is necessary to qualify the derivative work as true parody, such criticism is readily discernible.

The affidavit of Oscar Brand explains, as Judge Joiner has noted, that "this anti-establishment singing group [2 Live Crew] is trying to show how bland and banal the Orbison song seems to them." The district court accepted Brand's explanation. 754 F.Supp. at 1155. So do I. Whether one likes the original or not -- and the maxim "*de gustibus non est disputandum*" comes to mind here -- the original is quite clearly being held up to criticism by 2 Live Crew.

Consider the plot, if one may call it that, of the original work. A lonely man with a strangely nasal voice sees a pretty woman (name unknown) walking down the street.

The man speculates on whether the woman is lonely too. Apostrophizing her in his mind, he urges her to stop and talk and give him a smile and say she will stay with him and be his that night. The woman walks on by, and the man resigns himself to going home alone. Before he leaves, however, he sees the woman walking back to him. End of story.

This little vignette is intended, I think, to be sort of sweet. While it is certainly suggestive, it is also, by the standards of its time, "romantic" rather than indelicate. The singer evokes a sexual theme in his soliloquy, but then leaves the realization of his desire to the listener's imagination.

The parody by 2 Live Crew is much more explicit, and it reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses. The 2 Live Crew singers -- randy misogynists, not lonely Sir Lancelots -- raucously address a "big hairy woman" and her "bald-headed friend," one or both of whom are urged to "let the boys jump in." One singer chides a woman (the big hairy one, I think) for having cheated on him ("Two timin' woman/You's out with my boy last night"). In the end, this cloud proves to have what the singer sees as a silver lining:

> "Two timin' woman/That takes a load off my mind
> Two timin' woman/Now I know the baby ain't mine."

This, I should say, is "criticism" with a vengeance -- and the thematic relationship to the original is obvious. The relationship between the copyrighted song and the parody is every bit as patent here as was the corresponding relationship between the songs considered by the courts in *Elsmere Music, Inc. v. National*

Broadcasting Co., 482 F.Supp. 741 (S.D.N.Y. 1980), *aff'd* 623 F.2d 252 (2d Cir. 1980). That case involved an oft-repeated advertising jingle known as "I Love New York" and a Saturday Night Live take-off entitled "I Love Sodom." The parody was held to constitute a fair use of the original. The statutory factors, in my view, fully support a corresponding result in the instant case.

* * *

The first of the factors that we must consider is this:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. . . ."

In the case before us, of course, the purpose is parody and the character is commercial. Does the mere fact that the parodists hoped to make money mean that their use of the original work is presumptively unfair? I am by no means convinced that the Supreme Court would so hold -- and any such presumption would be readily rebuttable in any event.

It is true that in the *Betamax* case, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), the Court made the broad statement that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright. . . ." It is also true that this statement was quoted with approval in *Harper & Row*, 471 U.S. at 562. But both of those cases involved mechanical copying, literally or figuratively, without alteration of the copied material.

There is a difference, obviously, between copying and caricaturizing. By calling into being a new and transformed work, the caricaturist exercises a type of creativity that is foreign to the work of the copyist. And the creative work of the caricaturist is surely more

valuable than the reproductive work of the copyist. Thus it has been suggested that the presumption of unfairness in cases of commercial exploitation "is sensible and appropriate only when applied to commercial *reproductive* uses. . . ." Note, "The Parody Defense to Copyright Infringement: Productive Fair Use After *Betamax*," 97 Harv. L. Rev. 1395, 1408 (1984).

An illustration may help. W.S. Gilbert and Sir Arthur Sullivan created comic operas that are among the most commercially successful of all time. Gilbert and Sullivan certainly cannot be said to have had "nonprofit educational purposes" in mind when they wrote such a work as *Princess Ida*, one of their minor masterpieces. *Princess Ida* was, in Gilbert's words, "a respectful operatic perversion" of "The Princess," a lengthy poem by Tennyson. Would the world not be a poorer place if Lord Tennyson could have stilled the voice of W.S. Gilbert merely because Gilbert's purposes included the making of money? For anyone who loves Gilbert and Sullivan -- and their number is legion -- the question answers itself.

Similarly, I think, the world would be the poorer if the holders of the copyright on "I Love New York" had been allowed to block the Saturday Night Live rendition of "I Love Sodom." "[I]n today's world of often unrelieved solemnity," as the Second Circuit panel remarked in affirming the judgment in favor of Saturday Night Live, "copyright law should be hospitable to the humor of parody. . . ." *Elsmere Music Co., Inc.*, 623 F.2d at 253.

We should almost certainly be hospitable to the humor of parody if we allowed ourselves to be guided, as the Supreme Court was guided in the *Betamax* case, "by Justice Stewart's exposition of the correct approach to the ambiguities in the law of copyright." *Sony*, 464 U.S. at 431. The cause that is ultimately to be served, Justice Stewart observed in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), is "the cause of promoting broad public availability of literature, music

and other arts." What Justice Stewart called the "ultimate aim" of copyright law is "to stimulate artistic creativity for the general public good." *Id.* (footnote omitted). If we keep this ultimate aim in mind, it seems to me, we are not likely to conclude that parody for profit is presumptively "unfair."

* * *

The second statutory factor to be considered is

"(2) the nature of the copyrighted work. . . ."

The pertinent data in this connection are that Orbison and Dees published "Oh, Pretty Woman" long before the alleged infringement occurred, and that theirs is a work of the imagination rather than a piece of historical reportage.

That the original song had long since been published is a factor which works in favor of the 2 Live Crew defendants. See *Harper & Row*, 471 U.S. at 564, where the Supreme Court declared that "the scope of fair use is narrower with respect to unpublished works." The fact that "Oh, Pretty Woman" is a creative work might tend to offset the publication factor, perhaps, if the work were not being used for the purpose of parody. But parody routinely sets its sights on the fictive as opposed to the factual. If, as the Second Circuit insists, "parody and satire *are* deserving of substantial freedom," *Berlin*, 329 F.2d at 545, it would make no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for parodists' mills for the last two and a half millennia.

* * *

The third statutory factor is a somewhat problematical one, where parody is concerned:

> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole. . . ."

The "portion used" test is problematical in this context because parody cannot be parody unless it allows the original work to shine through in a form which, while distorted, is recognizable. "Parody by its nature demands close imitation," Bisceglia, "Parody and Copyright Protection," ASCAP Copyright Law Symposium No. 34 at 17; substantial usage is thus almost a given.

The Ninth Circuit has held that the fair use defense must fail when the purported parodists' copying "is virtually complete or almost verbatim." *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). I have no quarrel with this formulation; near-verbatim copying is closer to plagiarism than it is to parody. But neither the music nor the lyrics of 2 Live Crew's "Pretty Woman" can fairly be said to constitute near-verbatim copying of the Orbison and Dees original.[5]

"At the very least," the Second Circuit has said, a parody will pass muster under the "portion used" factor "where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire. . . ." *Berlin*, 329 F.2d at

[5]I recognize that the affidavit of musicologist Earl Spielman refers to a "one measure guitar lick" that "may have actually been sampled or lifted and then incorporated into the recording of 'Pretty Woman' as performed by The 2 Live Crew." But the Copyright Act "protects only those sound recordings 'fixed' on or after February 15, 1972," Note, "Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds," 87 Col. L. Rev. 1723, 1727-28 (1987), citing 17 U.S.C. § 301(c); Orbison and Dees recorded "Oh, Pretty Woman" in 1964. It is arguable, moreover, that a "sampling" of no more than a few notes should be governed by the maxim *de minimis non curat lex*. *Id.* at 1735. Finally, the plaintiffs have not shown by a preponderance of the evidence that any sampling really occurred here — and to my untrained ear, at least, it is obvious that most of the 2 Live Crew music was not lifted electronically from the 1964 recording.

545. Saturday Night Live's "I Love Sodom" was held to pass the "conjure up" test,[6] and 2 Live Crew's "Pretty Woman" does not appear to have appropriated more of the original on which it was based than did "I Love Sodom."

The district court (Wiseman, J.) made these observations about the amount and substantiality of the mimicry in the 2 Live Crew song:

> "In this case, 2 Live Crew has not mimicked so much of 'Oh, Pretty Woman' that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates*, this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin*. In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher*, 794 F.2d at 439." 754 F.Supp. at 1157.

I cannot improve on Judge Wiseman's analysis of the substantiality factor.

* * *

The last of the statutory factors is this:

[6]The Second Circuit noted by way of dictum in that case that "[e]ven more extensive use [than that necessary to 'conjure up' the original] would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." 623 F.2d at 253 n.1. Professor Nimmer's treatise asserts that "[t]his went too far," adding that "[t]he Second Circuit later drew back from this extreme. . . ." 3 Nimmer on Copyright, § 13.03[f] at 13-90.9-.10 (1992), citing *Warner Bros., Inc. v. American Broadcasting Companies*, 654 F.2d 204 (2d Cir. 1981), and *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981). I am by no means sure that the *Elsmere* dictum did go too far, but it makes no difference in the case at bar; the 2 Live Crew song passes the "conjure up" test in any event.

"(4) the effect of the use upon the potential market for or value of the copyrighted work."

To me, at least, it seems as clear in this case as it did to the Second Circuit in *Berlin* that "the parody has neither the intent nor the effect of fulfilling the demand for the original. . . ." 329 F.2d at 545.

The affidavit of Oscar Brand says that

> "Parodies have never interfered with the popularity of the original. * * * The sales graph of 'Hello, Dolly' didn't change when it became 'Hello, Lyndon,' and 'Hello, Nixon.' Hundreds of popular songs have been 'covered' by parody performances and recordings without altering their popular appeal or interfering with their sales."

Although Brand's assertion that parodies have "never" interfered with the popularity of the original strikes me as dubious, there has been no showing of any such interference here.[7] Brand -- who is probably on firmer ground when he sticks to the specifics of this case -- explains that the audiences for the two songs are quite different:

> "There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.
>
> [ ] On the other hand, 2 Live Crew's version[ ], which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called 'race' records. The group's

[7]Because parody is a special case, moreover, a drop in the popularity of the original "Oh, Pretty Woman" would be of doubtful relevance anyway. "[W]e must accept the harsh truth that parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." Kaplan, *An Unhurried View of Copyright*, at 69.

> popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original."

Brand's analysis of the market stands unrefuted. One month after Brand gave his affidavit, the plaintiff's Director of Licensing, Gerald Tiefer, executed an affidavit in which there is no attempt to deny that the two songs are aimed at different markets.[8] Mr. Tiefer does suggest, however, that the 2 Live Crew parody could impair the value of the plaintiff's right to grant licenses to parodists. And Mr. Jerry Flowers, Executive Director of Publishing for the plaintiff's parent corporation, says in an affidavit that the licensing of parodies of established hit songs has become extremely lucrative.

Judge Joiner invites our attention, in this connection, to *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992), where the Second Circuit observed that "the inquiry considers not only harm to the market for the original [work], but also harm to the market for derivative works." In a passage a portion of which was quoted with approval in *Harper & Row*, 471 U.S. at 568, similarly, the Nimmer treatise says that "[i]f the defendant's work adversely affects the value of any of the rights of the copyrighted work . . . [including the right to license derivative works,] the use is not fair even if the rights thus affected have not as yet been exercised by the plaintiff." 3 Nimmer on Copyrights, § 13.05[B] at 13-88.19 (1992) (citations omitted).

Nimmer, however, is not discussing parody here; the quoted passage deals with a motion picture hypothetically adopted from a copyrighted novel. And neither *Rogers v.*

[8]This case is thus different from *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F.Supp. 1517 (S.D.N.Y. 1988), where testimony "unequivocally established that the songs 'Nightmare on My Street' and 'Are You Ready for Freddy?' are in direct competition." *Id.* at 1528.

Koons nor *Harper & Row* involved parody either. The former was a case in which a sculpture had been copied with great fidelity from a photograph -- the artisans who produced the sculpture were told that the "*work must be just like photo*," 960 F.2d at 305 -- and the latter was a case in which quotations from the unpublished manuscript of President Ford's autobiography were lifted by the defendant verbatim.

Parody, again, is different. It transforms as it copies, and it may well savage the original work in the process. In the past, at least, copyright holders have not been overly enthusiastic about agreeing to see their works parodied -- and the law itself has licensed parodists, much as the law has given license to book reviewers, drama critics, and other commentators. Ours is a commercial age, to be sure, and consensual "parody licenses" may be more common now than they used to be. I confess that I am still uneasy, however, about the prospect of the courts turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result. "[P]ermissible parody, whether or not in good taste, is the price an artist pays for success. . . ." *MCA, Inc. v. Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting).

I said earlier in this opinion that there may be factors which, although not enumerated in the Copyright Act, merit consideration by the courts in determining when parody constitutes fair use. I shall mention only one such factor -- one foreshadowed in what has already been said. It is this: *the social value of the parody as criticism.*

In the case at bar, it seems to me, this factor militates rather strongly in favor of affirmance of the district

court's finding of fair use. The 2 Live Crew "Pretty Woman" is hopelessly vulgar, to be sure,[9] but we ought not let that fact conceal what may be the song's most significant message -- for here the vulgarity, to paraphrase Marshall McLuhan, *is* the message. The original work may not seem vulgar, at first blush, but the 2 Live Crew group are telling us, knowingly or unknowingly, that vulgar is precisely what "Oh, Pretty Woman" is. Whether we agree or disagree, this perception is not one we ought to suppress.

---

[9]Vulgarity, in practice, probably cuts against acceptance of the parody defense. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981), where the panel majority said this:

> "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).

I have some sympathy for this attitude, particularly where the parties really are "competitors;" be the lyrics of the derivative work dirty or clean, it goes against the grain to let a competitor reap where he has not sown. In the case at bar, however, there has been no showing that the parties are competitors. The 2 Live Crew song, moreover, is not just "a parody or satire on the mores of society" -- it is a parody or satire on the mores of Orbison's Pretty Woman and her admirer.

APPENDIX EE — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 26, 1992 DENYING PETITION FOR REHEARING EN BANC

No.91-6225

UNITED STATES COURT OFAPPEALS
FOR THE SIXTH CIRCUIT

ACUFF-ROSE MUSIC, INC.,

Plaintiff-Appellant,

v.

LUTHER R. CAMPBELL, A/K/A LUKE SKYYWALKER, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: NELSON and NORRIS, Circuit Judges; and JOINER,* Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

---

* Hon. Charles W. Joiner sitting by designation from the Eastern District of Michigan.

Appendix EE

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

FILED
JUN 1 1993
OFFICE OF THE CLERK

No. 92-1292

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF ON THE MERITS FOR PETITIONERS

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QUESTION PRESENTED

Whether Petitioners' commercial parody was a "fair use" within the meaning of 17 U.S.C. § 107.

PARTIES TO THE PROCEEDINGS

Petitioners:

Luther R. Campbell*
David Hobbs*
Mark Ross*
Christopher Wongwon*

Luke Skyywalker Records**

Respondent:

Acuff-Rose Music, Inc.

---

* The 2 Live Crew

** The pleadings in this case do not reflect that the corporate name of the recording company has been changed to Luke Records, Inc.

** The corporate Petitioner has no parent or subsidiary companies.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Statute Involved	2
Statement of the Facts	3
Statement of the Case	4
Summary of Argument	5
Argument:	
Petitioners' Parody Was a Fair Use Within the Meaning of 17 U.S.C. § 107.	7
A. The Guiding Principles	7
B. A Parody Is Presumptively Protected.	10

C. An Analysis of the Factors in 17 U.S.C. § 107 Supports the Trial Court's Determination that the Petitioners' Parody Constitutes Fair Use of the Respondent's Copyrighted Work. 13

1. Purpose and Character of Use 13

2. The Nature of the Copyrighted Work ... 21

3. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole 23

4. Effect on the Market 31

Conclusion 38

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Statutes Cited:

17 U.S.C. § 102 12

17 U.S.C. § 107 .....i, 2, 6, 7, 10, 13, 15, 16, 17, 19, 38, 39

17 U.S.C. § 115 ..... 4, 16

Page

28 U.S.C. § 1254(1) 2

United States Constitution Cited:

First Amendment 7

Article I, § 8 ..... 7, 22

Rules Cited:

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Rule 12(b) 4

Rule 67 4

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Page

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No. 92-1292

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX, professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF ON THE MERITS FOR PETITIONERS

OPINIONS BELOW

The judgment of the United States District Court is reported at 754 F. Supp. 1150 (M.D. Tenn. 1991).

The judgment of the Sixth Circuit Court of Appeals is reported at 972 F.2d 1429 (6th Cir. 1992).

STATEMENT OF JURISDICTION

Title 28 U.S.C. § 1254(1) provides this Court's jurisdiction. The judgment of the Sixth Circuit Court of Appeals was entered August 17, 1992. Petitioners' motion for rehearing and rehearing *en banc* was denied October 26, 1992. A Petition for Writ of Certiorari was timely filed in this Court on Monday, January 25, 1993, and certiorari was granted March 29, 1993.

STATUTE INVOLVED

17 U.S.C. § 107 provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;

> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE FACTS

Roy Orbison and William Dees were the co-authors of a song entitled "Oh, Pretty Woman." In 1964, Orbison and Dees assigned their rights in "Oh, Pretty Woman" to the Respondent, Acuff-Rose Music, Inc. On August 26, 1964, Respondent registered "Oh, Pretty Woman" for copyright protection under Copyright Registration No. EP-191739.

The Petitioners, collectively known as 2 Live Crew, are a well-known rap music group. On July 5, 1989, the Petitioners' general manager wrote Acuff-Rose Music, Inc., informing it that 2 Live Crew had written a parody of "Oh, Pretty Woman" entitled "Pretty Woman." Petitioners advised Acuff-Rose that they intended to afford all credit for ownership and authorship of the song "Oh, Pretty Woman" to Acuff-Rose, Dees and Orbison, and offered to pay the mechanical statutory rate for its use. Petitioners enclosed a copy of the lyrics and a recording of the parody for Acuff-Rose's review. (Affidavit of Luther Campbell, J.A. 87). Acuff-Rose refused permission: "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh Pretty Women.' " (J.A. 89). The Petitioners released the album *As Clean As They Wanna Be*, which included the parody "Pretty Woman."

STATEMENT OF THE CASE

In June, 1990, Acuff-Rose filed suit alleging that 2 Live Crew willfully infringed and commercially exploited its rights in the song "Oh, Pretty Woman" under the United States Copyright Act, interfered with the Respondent's business relations, and interfered with the Respondent's prospective business advantage. (Complaint, J.A. 15-27).[1] The Petitioners, in response to the Complaint, filed a Motion to Dismiss with supporting affidavits from a parodist, Oscar Brand, from a music industry expert, William Krasilovsky, and from Luther Campbell. (J.A. 28-29, 39-80, 30-38, 93-98, 83-92). The attachments converted the Motion to Dismiss to a Motion for Summary Judgment under Rule 12(b), Fed. R. Civ. P. (J.A. 28-29).

The Petitioners, in accordance with Rule 67, Fed. R. Civ. P., deposited funds in the trial court, as if 2 Live Crew's version was a derivative work of the Respondent's copyrighted work. Petitioners calculated the deposited amount using the statutory mechanical rate in § 115 of the Copyright Act. (Motion to Deposit Funds, J.A. 81-82). The trial court granted the Motion.

Acuff-Rose filed affidavits of its agent and a musicologist. (Response to Motion to Dismiss, J.A. 105-144). The trial court concluded that the parties' affidavits left no material facts in dispute and addressed the case on summary judgment.

---

1. Attached as Exhibit D to the Complaint was an audio cassette of "Oh, Pretty Woman" as recorded by Roy Orbison. Attached as Exhibit E to the Complaint was an audio cassette of "Pretty Woman" as recorded by the Petitioners. The Petitioners have lodged a copy of each audio cassette with this Court, so that a comparison of the two songs can be made. Exhibit B of the Complaint, a photocopy of the compact disc cover and compact disc, have also been lodged with the Court. In addition, Oscar Brand's sheet music comparison of the two songs has been lodged with the Court.

On January 14, 1991, the trial court granted 2 Live Crew's Motion for Summary Judgment and dismissed all three counts of the Respondent's Complaint. (J.A. 274-296). On October 2, 1991 the trial court returned the deposited funds and confirmed its fair use finding in favor of 2 Live Crew. (J.A. 335).

The Respondent appealed. (J.A. 339-40). The Court of Appeals for the Sixth Circuit reversed, over a dissent, and remanded to the trial court essentially with directions to grant summary judgment to Acuff-Rose. (J.A. 342-375). A Petition for Rehearing *en banc* was denied. (J.A. 376-77). Petitioners filed a timely Petition for Writ of Certiorari which was granted on March 29, 1993.

SUMMARY OF THE ARGUMENT

The recording at issue was a parody. It was produced for profit. The Sixth Circuit held "[T]he blatantly commercial purpose of the derivative work . . . prevents this parody from being a fair use." (J.A. 359). The Court rested its judgment on a sentence from *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), restated in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985) that "every commercial use of copyrighted material is presumptively an unfair exploitation . . . ."

The Sixth Circuit erred by giving undue weight to the *Sony/Harper & Row* comment. The Sixth Circuit erred by not giving sufficient weight to "parody" as a genre which necessarily imitates, copies and borrows in order to criticize, satirize and entertain.

Sony and *Harper & Row* addressed piracy and plagiarism, not parody. They cannot fairly be read to make commercial use the decisive factor in a copyright case presenting the question of

whether a certain parody is a fair use under 17 U.S.C. § 107. That statute identifies four non-exclusive factors as the starting point for fair use analysis: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used; (4) the effect of the use upon the potential market for the or value of the copyrighted work.

Of the statutory four, "effect on the market" is "undoubtedly the single most important element of fair use." *Harper & Row,* 471 U.S. at 566; *Stewart v. Abend,* 495 U.S. 207, 238 (1990). There was no evidence that 2 Live Crew's parody of "Oh Pretty Woman" adversely affected the existing or potential market for Roy Orbison's original song. That factor weighs heavily in favor of fair use, especially in a parody case.

The other statutory factors also favor fair use in this case. Parody has historically been accepted as fair use, and case law strongly supports its protection under the copyright laws. Parody is generally performed for commercial purposes, but its character as social commentary, even when commercial, cuts in favor of, not against, fair use. Thus the "purpose and character" factor strongly supports a fair use finding.

The "amount and substantiality" factor also favors the parody in this case. It borrowed enough only to conjure the image of the original work in the mind of the listener. It did not take "the heart of the book," *Harper & Row,* 471 U.S. at 564-65; it took only that which "a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point." *Elsmere Music,Inc. v. National Broadcasting Co.,* 623 F.2d 252, 253 n.1 (2d Cir. 1980).

Even the "nature of the copyrighted work" factor tips towards fair use in a parody case. Artistic and creative works are, of course, protected under copyright law. But parody, by definition, is the

comic imitation of writing in which the "language and style of an author or work is closely imitated for comic effect or in ridicule . . . ." Webster's Third New International Dictionary, Unabridged (1971). The 2 Live Crew's parody of "Oh Pretty Woman" flattered the creativity of the work by imitating it, exacting a fair use price which creative works must suffer under the First Amendment and the copyright laws' balanced efforts pursuant to Article I, § 8, "To promote . . . useful Arts," including parodies.

The Sixth Circuit's decision should be reversed, and the district court's finding of fair use affirmed.

ARGUMENT

PETITIONERS' PARODY WAS A FAIR USE WITHIN THE MEANING OF 17 U.S.C. § 107.

A. The Guiding Principles

The fair use doctrine, an exception to the law of copyright infringement, is an important and established rule of reason, guided, *but not limited* by four factors under 17 U.S.C. § 107: (1) the purpose and the character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work. *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 560-561 (1985).

> Fair use was traditionally defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." H. Ball, Law of Copyright and Literary Property,

> 260 (1944) . . . . The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine . . . . Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four *nonexclusive* factors to be considered. This approach was "intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94-1476, p. 66 (1976).

Id. at 549. (emphasis supplied). Fair use is "a 'rule of reason' fashioned by judges to balance the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other." ***Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.***, 626 F.2d 1171, 1174 (5th Cir. 1980).

The House Committee on the Judiciary, in an effort to define the general scope of fair use, identified seven examples of the kinds of use that are permitted. The Committee included and specifically identified "use in a parody of some of the content of the work parodied." U.S. House. Committee on the Judiciary, ***Copyright Law Revision (Part 1) Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law***, p. 24 Washington: Government Printing Office, July, 1961 (Y4.J89/1:C79/2). The Committee concluded that:

> Since the fair use doctrine may be applied in any number and variety of circumstances, it would be difficult to prescribe precise rules suitable for all situations. For example, the amount of work that may be properly used under that doctrine will vary according to the nature of the work, the essential character of

> the portion used, and the purpose and competitive effect of the use.
>
> Nevertheless, the doctrine of fair use is such an important limitation on the rights of copyright owners, and occasions to apply that doctrine arise so frequently, that we believe the statute should mention it and indicate its general scope. It seems anomalous to have the statute specify the rights of copyright owners in absolute terms without indicating that those rights are subject to the limitation of fair use.

Id. at 25.

The Petitioners' "Pretty Woman" was a parody of "Oh, Pretty Woman." The district judge wrote: "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody." (J.A. 281). The Court of Appeals accepted "that the purpose of the use was to parody the original." (footnote omitted). (J.A. 351). Circuit Judge Nelson, dissenting from the Sixth Circuit's conclusion that the parody was not fair use, framed the issue presented:

> Perhaps the most troublesome fair use issue of all is the question of whether a particular parody constitutes fair use of a copyrighted original. The parody cases appear to be in hopeless conflict.

(J.A. 360). This Court can resolve the conflict by recognizing parody's special place in art and literature, and by concluding that 2 Live Crew's commercial parody was fair use because, most importantly, it had no real effect "upon the potential market for or

value of the copyrighted work." 17 U.S.C. § 107(4).

> This last factor [§ 107(4)] is undoubtedly the single most important element of fair use. *See* 3 Nimmer § 13.05[A] at 13-76 and cases cited therein. "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." 1 Nimmer § 1.10[D] at 1-87.

Harper & Row, 471 U.S. at 566-67.

B. A Parody Is Presumptively Protected.

The parodist is an important part of European-American culture. The dictionary definition of "parody" reflects its roots:

> **par-o-dy** \'parade *also* 'per- or -di\ n -ES [L *parodia*, fr. Gk *paroidia*, fr. *para* beside + *oidia* (*fr. oeidein* to sing) — more at ODE] **1 a** : a writing in which the language and style of an author or work is closely imitated for comic effect or in ridicule often with certain peculiarities greatly heightened or exaggerated (these plays . . . are *parodies* of eighteenth century French farce —Claudia Cassidy> **b** : a literary style characterized by the reproduction of stylistic peculiarities of an author or work for comic effect or in ridicule (the dialogue . . . lapses now and then into inadvertent ≈ — Wolcott Gibbs> — compare BURLESQUE I **2** : a form or situation showing imitation that is faithful to a degree but that is weak, ridiculous, or distorted : a feeble or ridiculous imitation <a straggling ≈ of a military moustache —Fred Majdalany> <the . . . elite who live a ≈ of 19th century French culture —Alastair Reid> **3 a** : an imitation of a musical composition in which the original text or music has been altered usu. in a comical manner **b** : PARODY MASS syn see CARICATURE

Webster's Third New International Dictionary, Unabridged (1971).

Parody has historically been protected because of its important social and political significance as a form of expression which often communicates political views to the public. The parody is deeply rooted in our nation's history. These creative derivative works have historically been commercially sold and performed. "Yankee Doodle,"[2] "The Star Spangled Banner,"[3] and

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2. The origins of "Yankee Doodle" have been much debated by historians, but the most persuasive theory traces the song's beginnings to an English ditty, "Lucy Locket" (or "Fisher's Jig"). The "Yankee Doodle" lyrics were originally written (and the title supplied) by an English army surgeon as a comment on the ragtag character of colonial troops in the French and Indian War. But during the Revolutionary War, the lyrics were rewritten, in numerous verses and variations, as an anti-British song. Most variant uses, like "The Battle of the Kegs," a "harmonious ditty" by Francis Hopkinson (a signer of the Declaration of Independence) addressed specific current events — in that case a botched plan to blow up English ships in Philadelphia harbor. *See* Howard, John Tasker, *Our American Music: A Comprehensive History From 1620 to the Present*, Crowell (1965), pp. 37, 113-118; *See also*, Even, David, *Great Men of American Popular Song*, Prentice Hall (1970), p. 6.

3. The "Star Spangled Banner" began, circa 1775, as the marching song of London's Anacreontic Society, "To Anacreon in Heaven." Originally, the song was an ode to love and wine, with each stanza ending "And besides I'll instruct you, like me, to entwine/ The myrtle of Venus with Bacchus's vine." The first American parody of the song was published in New York in 1793 ("The genius of

(Cont'd)

"America" ("My Country 'Tis of Thee")[4] are all political song parodies, with American words put to popular English ballads of the day. The use of political, musical parodies has continued throughout the history of this country, including recent commercial radio station parodies on the 1991 Gulf War.[5]

Parody's historical importance as a form of social criticism and commentary requires a favorable fair use presumption as part of the fair use analysis. Since a parody is itself creative, it too must be afforded protection as fair use under the Copyright Act. The Petitioners' creative derivative work, admittedly a parody of the Respondent's copyrighted work, possesses the two fundamental criteria for copyright protection as defined by 17 U.S.C. § 102:

(Cont'd)

France from his star begem'd throne"), but the song soon thereafter became a vehicle for patriotic theses, such as "Sons of Columbia," "For the Glorious Fourth of July," "Union of the Gods," and "Freedom." The parody, "Adams and Liberty," helped boost the Federalist cause, while a few years later "Jefferson and Liberty" boosted the rival party. In the War of 1812, the melody was first used for "The Battle of the Wabash," and — as we know it today —in Francis Scott Key's "Defense of Fort McHenry." Howard, John Tasker, *Our American Music: A Comprehensive History From 1620 to the Present, op. cit.*, pp. 121-126.

4. "America" began with "Sally in My Alley," an English tavern song. An early suffragette adapted to it a poem entitled "Rights of Woman." The resulting song began, "God save each female's right/ Show to her ravish'd sight/ Woman is free." Shortly thereafter, the melody produced the English patriotic standard, "God Save the King." In 1831, Samuel Francis Smith used it for "America." *Id.* at 126-128.

5. In the first two months after Iraq's invasion of Kuwait, more than a dozen parodies appeared on the airwaves, including "Hussein is Crazy" (to "She Drives Me Crazy"), "Iraquity-Rag" (to "Yackety-Yak"), "Iraq and a Hard Place" (to "A Rock and a Hard Place"), and "Iraqi Blues" (to 'Summertime Blues"). All of these songs were written and produced by disk jockeys at commercial radio stations, and given air time on those stations alongside commercial songs. Baltimore Sun, "Song Parodist Aims Poison-Pen at Iraq," August 23, 1990.

"originality" and "fixation in tangible form." Therefore, like the copyrighted work, the Petitioners' parody has artistic importance and sufficient "originality" to warrant some protection under the Copyright Act of 1976. A presumption of fair use, or the requirement that parodistic efforts be given substantial weight as part of the fair use equation, sets the proper stage for judging copyright cases concerned with parodies.

The trial court, on undisputed facts, determined, that the Petitioners' creative derivative work of parody constituted "fair use," applying the four statutory factors in 17 U.S.C. § 107. The undisputed facts, and the law in this case, compel the conclusion that 2 Live Crew's "Pretty Woman" meets the fair use test under the four statutory factors, and the unenumerated "parody" factor. The importance of the parody genre is central to review of the statutory factors.[6]

C. An Analysis of the Factors in 17 U.S.C. § 107 Supports the Trial Court's Determination that the Petitioners' Parody Constitutes Fair Use of the Respondent's Copyrighted Work.

1. Purpose and Character of Use

The issue presented is "whether Petitioners' commercial parody was a 'fair use' within the meaning of 17 U.S.C. § 107." Order granting certiorari, 113 S. Ct. 1642, March 29, 1993. The purpose and character of a parody is to imitate. The trial court, the appellate court, and even the Respondent's agent, when denying permission to 2 Live Crew, characterized the Petitioners' creative derivative work as a "parody." Judge Nelson's dissent said:

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6. The Sixth Circuit recognized parody's privilege: "[W]e find that the term parody must be either subsumed within the statutory terms 'criticism' or 'comment' or be an entirely separate category of exception." (J.A. 350-51). The majority simply did not afford parody its proper weight in the statutory analysis.

> I am satisfied that the 2 Live Crew version both imitates and distorts the original work for comic or satiric effect, and does so in such a way that both the original work and the work of the parodist are readily recognizable. The parody (done in an African-American dialect) was clearly intended to ridicule the white bread original — and if a higher criticism is necessary to qualify the derivative work as true parody, such criticism is readily discernable.

(J.A. 365). Judge Nelson continued, after comparing the themes of the two works:

> This, I should say, is "criticism" with a vengeance — and the thematic relationship to the original is obvious. The relationship between the copyrighted song and the parody is every bit as patent as was the corresponding relationship between the songs considered by the courts in *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980) aff'd 623 F. 2d 252 (2nd Cir. 1980). That case involved an oft-repeated advertising jingle known as "I Love New York" and a Saturday Night Live take-off entitled "I Love Sodom." The parody was held to constitute a fair use of the original. The statutory factors, in my view, fully support a corresponding result in the instant case.

(J.A. 366-67).

Even the majority accepted (with reservation) "the district court's conclusion that the purpose of the use was to parody the

original." (J.A. 351). The majority acknowledged that parody, prior to the codification by Congress, had long been a recognized exception of the common law "fair use" doctrine. In *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2nd Cir. 1964), Judge Kaufman wrote:

> For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom — both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels" or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest.

(Emphasis in original).

Parody's character and use as political and social commentary weighs heavily in favor of fair use. While we suggest a presumption in favor of fair use if a creative derivative work can be characterized as a parody (with the copyright owner relying upon the statutory factors and other relevant information to attempt to rebut the fair use presumption), under any construct this parody is entitled to claim its full allowance of fair use freedom under subsection (1) of § 107.

The Petitioners' request for permission to parody "Oh, Pretty Woman," their offer of statutory fees, and the rejection of that offer, buttresses our argument.[7]

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7. Petitioners' deposit of the statutory fee was an attempt to recognize the balance between the copyright owner's statutory right to compensation and the public's right to access copyrighted works. Respondent's rejection of remuneration was a rejection by the Respondent of the Petitioners' right to freedom of expression.

In certain circumstances a derivative work must pay a statutory rate for its use of the copyrighted work. 17 U.S.C. § 115. However, if the derivative work is creative and distinguishable from the copyrighted work, such as a parody, then the use constitutes fair use and no payment is required under 17 U.S.C. § 107. One of the reasons why payment is not required is because the copyright owner will likely resent and object to the parody, and as in the case at bar, may even refuse payment from the parodist. It is in part the "originality" that the copyright owner objects to as well as the "criticism" and "comment" of the copyrighted work.

Scores of companies, groups, and individuals write, perform, and record political parody songs of copyrighted material. These range from the nationally televised Saturday Night Live [see *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980)], to lesser known local groups which charge for admission, and/or sell audio tapes of their performances.[8] Few, if any, of these groups and individuals seek or obtain permission for their parodies. Further, it is highly unlikely that the copyright owners would grant permission if requested. *See* Appendices to Capitol Steps Productions, Inc. and Mark Russell Motion for Leave to File Brief Amicus Curiae in Support of Petitioners. The Petitioners should be lauded, not punished, for seeking permission prior to releasing their parody. In *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986), the United States Court of Appeals for the Ninth Circuit commented:

> Fisher and Segel fault Dees for using the song after Fisher expressly refused him permission

8. These include Minnesota Public Radio's "Prairie Home Companion" and "American Radio Theater," Oregon's "Summer Angels," the "Bushwackers" of Oberlin College, Ohio, the "Last Chance Dixieland Jazz Bank" of Helena, Montana, and Washington, D.C.'s "Hexagon," and "Mrs. Foggybottom and Her Friends."

> to do so. In their view, this shows bad faith on Dees's part. We cannot agree. Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee. *See* Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1397 n. 12 (1984) .... The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought. *See* 3 M. Nimmer, *supra*, Section 13.05[C], at 13-89; Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum.L.Rev. 1600, 1633 & n. 177. Moreover, to consider Dees blameworthy because he asked permission would penalize him for this modest show of consideration. Even though such gestures are predictably futile, we refuse to discourage them.

The second aspect of the first factor of 17 U.S.C. § 107 is the "character of use, including whether such use is of a commercial nature or is for non-profit educational purposes." This Court, when it reworded the question presented, clearly focused on the commercial nature of the use. The court below was persuaded that commercial use meant unfair use, relying on its interpretation of *Sony Corp.*, 464 U.S. 417, and *Harper & Row*, 471 U.S. 539.

In both *Sony* and *Harper & Row*, this Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of

the copyright." *Sony Corp.*, 464 U.S. at 451; *Harper & Row, Publishers, Inc.*, 471 U.S. at 562. The Court of Appeals for the Sixth Circuit both misapplied the presumption to a creative derivative work such as a musical parody, and strengthened the presumption in a context far different from that presented in each of those cases. Justice Brennan, dissenting in *Harper & Row,* predicted that the commercial use presumption created in *Sony* would be misapplied and misused to limit the dissemination of creative derivative works.

> Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. See 17 U.S.C. § 107.

471 U.S. at 579 (Brennan, J., dissenting).

Justice Brennan later noted in his dissenting opinion:

> The Court's reliance on the commercial nature of The Nation's use as "a separate factor that tends to weigh against a finding of fair use," *ante*, at 562, is inappropriate in the present context. Many uses § 107 lists as paradigmatic examples of fair use, including criticism, comment, and *news reporting*, are generally conducted for profit in this country, a fact of which Congress was obviously aware when it enacted § 107. To negate any argument favoring fair use based on news reporting or criticism because that reporting or criticism

> was published for profit is to render meaningless the congressional imprimatur placed on such uses.

Id. at 592 (emphasis in original).

Until the decision below, the dominant forces in shaping the fair use doctrine as it pertained to musical song parodies had been the Second and Ninth Circuit Courts of Appeal. This was a case of first impression in the Sixth Circuit. (J.A. 351).

The Second and Ninth Circuits, in a series of decisions including *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2nd Cir. 1964); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); and *Elsmere Music Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2nd Cir. 1980), have long provided an interpretation of 17 U.S.C. § 107 which draws a careful distinction between the parody of a musical work and the plain piracy of that work for commercial gain. These decisions had been the benchmarks which guided composers and performers using parodies of copyrighted works. Neither *Sony* nor *Harper & Row* supports the Sixth Circuit's view that "commercial use" outweighs the parody purpose of the use.

Sony involved verbatim copying of the copyrighted work by non-parties to the suit — VCR owners. *Harper & Row* involved the reporting of portions of an unpublished manuscript by a direct competitor of the licensor. Neither case examined the fair use doctrine as applied to a creative derivative work such as a musical parody. Nor did they address a case in which a parodist sought permission and offered compensation to the copyright holder. However, *Harper & Row's* insights into "character of the use" supports Petitioners' position, given their offer to pay Acuff-Rose.

> Also relevant to the "character" of the use is "the propriety of the defendant's conduct." 3

> Nimmer § 13.05[A] at, 13-72. "Fair use presupposes 'good faith' and 'fair dealing.' " *Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968), quoting Schulman, *Fair Use and the Revision of the Copyright Act*, 53 Iowa L.Rev. 832 (1968). . . . Fair use "distinguishes between 'a true scholar and a chiseler who infringes a work for personal profit'."

Harper & Row, 471 U.S. at 562-63 (citation omitted).

Parody and all forms of social criticism are generally commercial. A written parody may appear in a periodical which either receives remuneration from the general public for the purchase and/or from advertisers who support the distribution of the periodical. Television and radio parodies are available to the public because advertisers purchase air time from the station and/or television network, or because the viewers purchase the cable programming. Even a street performer who performs a parody of a copyrighted work usually passes a hat around to the audience to support his or her existence. Commercial use is only a starting point for determining whether a parody is a fair use.

The decision below created an unreasonable presumption against a finding of fair use for a commercial parody. If allowed to stand, it will have a chilling effect on parody in this country. *See* Capitol Steps Productions, Inc. and Mark Russell's Motion For Leave To File Brief of Amicus Curiae in Support of Petitioner.

The facts and holdings in *Sony* and *Harper & Row* are easily distinguishable from this case. Here, the decision should be that no presumption exists against a finding of fair use for a commercial parody. A rebuttable presumption in favor of fair use, if a creative derivative work can be defined as a parody, is a fairer approach to

the statutory and historical protections sought by the copyright laws. As stated in *Harper & Row* in another context, the commercial nature of a derivative work merely "tends to weigh against a finding of fair use." 471 U.S. at 562. The decision below went too far when it held that "it is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use." (J.A. 359). That view was unsupported by any fair analysis of the facts and the relevant law.

2. The Nature of the Copyrighted Work

Judge Nelson's dissent viewed the creative nature of the copyrighted work as important, but not controlling because parodies tend to mock widely recognized copyrighted works known to the public. It would defeat the purpose of the parody if its intended audience did not recognize the copyrighted work parodied. Judge Nelson wrote:

> The pertinent data in this connection are that Orbison and Dees published "Oh, Pretty Woman" long before the alleged infringement occurred, and that theirs is a work of the imagination rather than a piece of historical reportage.
>
> That the original song had long since been published is a factor which works in favor of the 2 Live Crew defendants. *See Harper & Row*, 471 U.S. at 564, where the Supreme Court declared that "the scope of fair use is narrower with respect to unpublished works." The fact that "Oh, Pretty Woman" is a creative work might tend to offset the publication factor, perhaps, if the work were not being used for the purpose of parody. But parody routinely sets its

> sights on the fictive as opposed to the factual. If, as the Second Circuit insists, "parody and satire are deserving of substantial freedom," *Berlin*, 329 F. 2d at 545, it would make no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for parodists' mills for the last two and a half millennia.

(J.A. 369).

Article I, § 8 of the Constitution gives Congress power to promote "useful Arts." The copyright laws seek to achieve that purpose both by providing exclusive rights to authors, and by incorporating a "fair use" exception to those rights. That recognition seeks to expand, not contract, creativity. Thus an artist who has achieved a modicum of success must pay a fair price — the ability to suffer imitation, criticism, or parody with a smile:

> [A]ny work of sufficient notoriety to be the object of parody has already secured for its proprietor considerable financial benefit. According that proprietor further protection against parody does little to promote creativity but it places a substantial inhibition upon the creativity of authors adept at using parody to entertain, inform, or stir public consciousness.

Warner Brothers, Inc. v. American Broadcasting Companies, Inc., 720 F.2d 231, 242-243 (2d Cir. 1983).

Consequently, the creative nature of the Orbison-Dees work does not insulate it from fair use. On the factual record of this case, 2 Live Crew's parody does not offend the "nature of the work" statutory factor.

3. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The district court recognized that "this element contains quantitative and qualitative elements and as a result the amount of protected material that a copier may take under the rubric of fair use will vary from case to case." (J.A. 283).

The Sixth Circuit concurred:

> Parodies are generally allowed to use more of the copyrighted work and still fall within the rubric of fair use than are other types of copying:
>
> [T]he concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to "conjure up" the original. *Elsmere*, 623 F.2d at 253 n. 1 (citation omitted).

(J.A. 355).

The dissent said:

> The "portion used" test is problematical in this context because parody cannot be parody unless it allows the original work to shine through in a form which, while distorted, is recognizable. "Parody by its nature demands close imitation," Bisceglia, "Parody and Copyright Protection," ASCAP Copyright

> Law Symposium No. 34 at 17; substantial usage is then almost a given.

(J.A. 370).

In *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), the court held that determining whether or not the parodist exceeded the amount which could be taken from the original work depended upon the medium of the respective work. " '[W]hen the medium involved is a comic book, a recognizable caricature is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied.'" *Id.* at 439 (quoting *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978)). The court concluded:

> Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for accuracy" provides some license for "closer" parody. *See id.* To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in his original expression." *Id.* We think the balance tips in the parodist's favor here. In view of the parody's medium, its purposes, and its brevity, it takes no more from the original than is necessary to accomplish reasonably its parodic purpose.

794 F.2d at 439 (footnote omitted).

In *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956),

affirmed by an equally divided court *sub nom. Columbia Broadcasting System, Inc. v. Loew's, Inc.*, 356 U.S. 43 (1958), Jack Benny's half-hour television burlesque of the movie "Gaslight" was viewed as a copyright infringement. The central determination in that decision was that the burlesque took substantially from the original. In *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 350 (S.D.Cal. 1955), the same district judge in the Jack Benny case held that a Sid Caesar/Imogene Coca television burlesque, "From Here to Obscurity," did not infringe the copyright of the movie, "From Here to Eternity," nor did the telecast constitute unfair competition to the movie. The court distinguished its holding in *Benny v. Loew's:*

> Unlike *Loew's*, here there was a taking of only sufficient [sic] to cause the viewer to recall and conjure up the original. This is a necessary element of burlesque. As Dr. Baxter stated at the trial of *Loew's Incorporated v. Columbia Broadcasting System, Inc.*, the defendant has taken a small part and then " '[taken] off into the blue.' " 137 F. Supp. at 351.

The undisputed facts in this case support the same conclusion. Luther Campbell said:

> In writing the parody I felt it was necessary for the listener to identify the parody version with the original version . . . . I chose to include the distinctive introduction of the original version of "Oh Pretty Woman" and the first line of lyrics because I felt this was sufficient for the listeners to identify the parody with the original work.

(J.A. 84).

Oscar Brand, an expert in musical parodies, said:

> In sum, the music on 2 Live Crew's "Pretty Woman" uses just enough material from the Orbison composition to create a very sophisticated comic parody of the original song.

(J.A. 32-33).

The Acuff-Rose musicologist did not contest that conclusion. (J.A. 138-41).

Other cases lend support to the difference parody makes when judging amount and substantiality. *Bloom & Hamlin v. Nixon*, 125 F. 977, 978 (USCC Pa. 1903) found that the singing of the chorus of a copyright song, "Sammy" from the Wizard of Oz" was not an infringement when sung by one mimicking the star of the show. The court held that the chorus of the song was "a mere vehicle for carrying the imitation along" and did not constitute an infringement.

In *Berlin v. E.C.Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), the plaintiffs alleged that Mad Magazine, by compiling a "collection of parody lyrics to 57 old standards which reflect the idiotic world we live in today," infringed upon the copyrights held by the original works. *Id.* at 543. The parody lyrics were written in the same meter as the original lyrics."A Pretty Girl is Like a Melody" was reconstituted into "Louella Schwartz Describes Her Malady." The Court of Appeals affirmed the dismissal of the original song publisher's claims of infringement:

> We believe in any event that the parody lyrics involved in this appeal would be permissible under the most rigorous application of the

> "substantiality" requirement. The disparities in theme, content and style between the original lyrics and the alleged infringements could hardly be greater. In the vast majority of cases, the rhyme scheme of the parodies bears no relationship whatsoever to that of the originals. While brief phrases of the original lyrics were occasionally injected into the parodies, this practice would seem necessary if the defendants' efforts were to "recall or conjure up" the originals; the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounts to a "substantial" taking, if that standard is not to be woodenly applied. Similarly, the fact that defendants' parodies were written in the same meter as plaintiffs' compositions would seem inevitable if the original was to be recognized, but such a justification is not even necessary; we doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter.
>
> In short, we believe that whatever use was made of the plaintiffs' works in this case fell far short of the "substantial" takings which were involved in Benny, even if we were to find the rationale of that opinion persuasive. While the social interest in encouraging the broad-gauged burlesques of Mad Magazine is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here. *Cf. Bleistein v. Donaldson Lithographing*

Co., 188 U.S. 239, 47 L.Ed. 460 (1903). For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom — both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels" or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.

329 F.2d at 545 (emphasis in original).[9]

Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980), found that a skit on the television program Saturday Night Live which "poked fun at New York City's public relation campaign and its theme song," did not constitute copyright infringement. The Plaintiffs had alleged that the parody "I Love Sodom" infringed on their copyright of the song "I Love New York." The District Court summarized the parody:

---

9. In *Berlin* the court emphasized the failure by the plaintiffs to "indicat[e] with any degree of particularity the manner in which [commercial] injury might have been inflicted" and found that this tended to weaken the plaintiffs' claims. 329 F.2d at 543. The Respondent in its supporting affidavits has also failed to state with any particularity how the Petitioners' use has caused any proximate injury. *See* discussion, *infra* at pp.31-38.

> The song "I Love Sodom," as well as the sketch of which it was a part, was clearly an attempt by the writers and cast of SNL to satirize the way in which New York City attempted to improve its somewhat tarnished image through the use of a slick advertising campaign.

482 F. Supp. at 745.

The Second Circuit affirmed *per curiam* "on Judge Goettel's thorough opinion," 623 F.2d at 253, and appended an enlightening footnote:

> The District Court concluded, among other things, that the parody did not make more extensive use of appellant's song than was necessary to "conjure up" the original. 482 F.Supp. at 747. While we agree with this conclusion, we note that the concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 354 (S.D.Cal. 1955). A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody *builds upon the original*, using the original as a known element of modern culture *and contributing something new for humorous effect or commentary.*

Id. n. 1 (emphasis added).

The trial court in this case compared the two "Pretty Women" and concluded that 2 Live Crew took only that which was necessary to make their parody point:

> Acuff-Rose argues that the portions taken from "Oh, Pretty Woman" are both qualitatively and quantitatively significant. According to the plaintiff's musicologist, Earl V. Speilman, the two works are substantially similar. The copying includes the name of the song and key lyrics. The 2 Live Crew version also includes the same guitar refrain, opening drum beat and melody and chorus. Affidavit of Earl V. Speilman. Since the original song is so popular, Acuff-Rose contends that 2 Live Crew does not need to copy much of the original in order to conjure up its memory.
>
> But the conclusion drawn by the plaintiffs does not address whether 2 Live Crew used more of the copyrighted work than was necessary to recall or conjure up "Oh, Pretty Woman." *See, e.g., Fisher,* 794 F.2d at 438 n. 4 (holding that affidavits conflicting on question of substantiality are irrelevant given that issue of extent of taking is a question of law). No one disputes that 2 Live Crew copied "Oh, Pretty Woman." But the question about substantial similarity cannot be divorced from the purpose for which the defendant's work will be used.

(J.A. 284).

The trial court decided:

> In this case, 2 Live Crew has not mimicked so much of "Oh, Pretty Woman" that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates,* this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin.* In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher,* 794 F.2d at 439.

(J.A. 286).

The Court of Appeals apparently concluded this factor was a draw. It concluded that the relevant facts "cannot be used in any way to support a finding of fair use." (J.A. 357). But neither did the court find that the portion used cut against fair use. That approach is inconsistent with the cases recognizing a parody's need to copy. When parody is added to the "amount and substantiality" factor, 2 Live Crew prevails on this point too.

4. Effect on the Market

The Court has acknowledged that this factor is "undoubtedly the single most important element of fair use." *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 566 (1985). It is the " 'most important, and indeed central fair use factor.' 3 Nimmer § 13.05 [A], p. 13-81;" *Stewart v. Abend,* 495 U.S. 207, 238 (1990).

Judge Nelson's dissent below carefully examined the

affidavits presented by the parties, which constituted the only effect on the market evidence before the trial court. He concluded:

> To me, at least, it seems as clear in this case as it did to the Second Circuit in *Berlin* that "the parody has neither the intent nor the effect of fulfilling the demand for the original . . . ." 329 F.2d at 545.

The affidavit of Oscar Brand says that

> "Parodies have never interfered with the popularity of the original. * * * The sales graph of 'Hello, Dolly' didn't change when it became 'Hello, Lyndon' and 'Hello, Nixon.' Hundreds of popular songs have been 'covered' by parody performances and recordings without altering their popular appeal or interfering with their sales."

Although Brand's assertion that parodies have "never" interfered with the popularity of the original strikes me as dubious, there has been no showing of any such interference here. Brand — who is probably on firmer ground when he sticks to the specifics of this case — explains that the audiences for the two songs are quite different:

> There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.

> On the other hand, 2 Live Crew's version, which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called 'race' records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original."

Brand's analysis of the market stands unrefuted. One month after Brand gave his affidavit, the plaintiff's Director of Licensing, Gerald Teifer, executed an affidavit in which there is no attempt to deny that the two songs are aimed at different markets. Mr. Teifer does suggest, however, that the 2 Live Crew parody could impair the value of the plaintiff's right to grant licenses to parodists. And Mr. Jerry Flowers, Executive Director of Publishing for the plaintiff's parent corporation, says in an affidavit that the licensing of parodies of established hit songs has become extremely lucrative.

(J.A. 372-73).[10]

Petitioners' Krasilovsky affidavit supported Brand, the district court and the dissent. Mr. Krasilovsky stated: "In other

---

10. Judge Nelson distinguished the licensing of parodies from interference with the primary market, and noted the potential for copyright censorship if only licensed parodies were permitted. (J.A. 374). We discuss, *infra* at 35-37, the fallacy of letting future parody licensing govern the fair use analysis.

words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version." (J.A. 95).

Bass music, the regional style of hip hop music played by the 2 Live Crew, was created in the Liberty City area of Miami, where the group's leader, Luther Campbell, began his career. The parody created by the Petitioners was intended for a specific audience, young urban blacks. The purpose of the parody was to mock the banality of white centered rock-n-roll music by attacking one of its time honored ballads. (J.A. 34). The intended market for the parody was as different from that of the copyrighted work as black and white.

The trial court in this case concluded:

> With respect to the parody "Pretty Woman," this fourth factor favors the defendants. As in *Fisher,* it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different. The odds of a record collector seeking the original composition who would also purchase the 2 Live Crew version are remote. Defendants' Affidavit of William Krasilovsky. "The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Defendant's Affidavit of Oscar Brand. Second, while Acuff-Rose is not required to prove damages, *Marcus v. Rowley,* 695 F. 2d 1171, 1177 (9th Cir. 1983), it has not produced

> convincing evidence that any harm to any existing or potential market has occurred.

(J.A. 288).

The trial court echoed *Elsmere:*

> The song has not affected the value of the copyrighted work. Neither has it had — nor could it have — the "effect of fulfilling the demand for the original." *Berlin v. E.C. Publications, Inc., supra,* 329 F.2d at 545. Just as imitation may be the sincerest form of flattery, parody is an acknowledgement of the importance of the thing parodied. In short, the defendant's version of the jingle has not in the least competed with or detracted from plaintiff's work.

Elsmere Music, Inc. v. National Broadcasting Co., supra, 482 F. Supp. at 747.

The opinion below misapplied the "effect on the market" factor because it failed to focus on the potential market of the original copyrighted work. Instead, the court focused on the harm which it perceived the Petitioners' creative derivative work might cause to the market for licensing future potential parodies of "Oh, Pretty Woman." (J.A. 357-58). If the Sixth Circuit had concentrated its analysis on the parody's effect on the potential market of the original copyrighted work, it could only have reached the conclusion that this most important factor favors a finding of fair use.

Acuff-Rose contended that the Petitioners' parody precluded Acuff-Rose from developing its own parody of "Oh Pretty

Woman" although offering no reasonable expectation of criticizing or mocking its own rock-n-roll ballad. Nevertheless, the Court of Appeals accepted the argument. (J.A. 357-58). That precedent means every parody, commercial or otherwise, could be defeated in a fair use case by the copyright owner simply asserting its intent to release a future parody of its own original work.

The district judge rejected that idea:

> Plaintiffs attempted to focus on their possible future losses and mount two different arguments. First, they contend that 2 Live Crew's parody prevents them from marketing future derivative works, such as a rap version or even their own "burlesque" of the Orbison original. Second, they argue that "Oh, Pretty Woman" "has been tarnished by being associated with these lyrics and with 2 Live Crew" and that will result in the loss of future licensing arrangements.
>
> Since 2 Live Crew's version of "Oh, Pretty Woman" is a parody, that release has not prevented Acuff-Rose from recording whatever version of the original it desires. Likewise, plaintiff's argument that it would be prevented from releasing a parody of their work is meritless. In a world where copyright monopoly stretched to that great extent, parodies would be unlikely ever to be approved by the original author. See 3 Nimmer, *Nimmer on Copyright*, § 13.05[C] at 13-90. 12; *Fischer*, 794 F. 2d at 437 (Parodist will seldom get permission from those whose works are parodied. . . . The parody defense to copyright

> infringement exists precisely to make possible a use that generally cannot be bought.")

(J.A. 289).

Judge Nelson's Sixth Circuit dissent concurred with the trial court:

> Parody, again, is different. It transforms as it copies, and it may well savage the original work in the process. In the past, at least, copyright holders have not been overly enthusiastic about agreeing to see their works parodied — and the law itself has licensed parodists, much as the law has given license to book reviewers, drama critics, and other commentators. Ours is a commercial age, to be sure, and consensual "parody licenses" may be more common now than they used to be. I confess that I am still uneasy, however, about the prospect of the courts turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result. "[P]ermissible parody, whether or not in good taste, is the price an artist pays for success . . . ." *MCA, Inc. v. Wilson*, 677 F. 2d 180, 191 (2nd Cir. 1981) (Mansfield, J., dissenting).

(J.A. 374).

The Petitioners' creative derivative work, unlike *Sony* and *Harper & Row*, did not involve verbatim copying which could harm the market for the original product. The Petitioners created a

separate and distinct creative work which is entitled to protection under the Copyright Act. In *Sony*, the verbatim copying was intended to supplant the copyrighted work by simply altering the availability of the original copyrighted work as to when the public could view the copyrighted work. Nevertheless, this Court found "fair use." In *Harper & Row*, the heart and soul of the unpublished copyrighted work was presented in the guise of a book review. The substantial taking directly competed with the copyrighted work because, as a direct and proximate result of its publication, Time Magazine, the licensor of the unpublished work, terminated its licensing agreement to publish excerpts and failed to pay the balance of the licensing fee. The publication by Nation Enterprises did not constitute "fair use" precisely because it *did* adversely affect the potential market of the copyrighted work.

There is no evidence in this record that the Petitioners' creative derivative work has adversely affected either the existing market and/or a potential market for the Respondent's copyrighted work. Thus, on this most important factor, the 2 Live Crew prevails.

CONCLUSION

The Petitioners' commercial parody constitutes "fair use" of the Respondent's copyrighted work. The first factor of 17 U.S.C. § 107, the purpose and character of the use, favors the Petitioners because their creative derivative work is a parody. The second factor, the nature of the copyrighted work, favors the Petitioners because parody must be built on the original creator's accomplishments. The third statutory factor, the amount and substantiality of the portion used, favors the Petitioners because they used only that amount necessary to "conjure up" the copyrighted work. Finally, the fourth and determinative statutory factor favors the Petitioners because the Petitioners' creative derivative work does not substitute for the copyrighted work nor

does it adversely affect the future marketability of the copyrighted work.

A careful analysis of the four factors articulated in 17 U.S.C. § 107 supports a finding that the Petitioners' creative derivative work did constitute "fair use." When the social and historical importance of artistic parody is factored into the "fair use" equation, use of the parody genre, even if commercial, is presumptively fair.

The Court should reverse the decision of the United States Court of Appeals for the Sixth Circuit and reinstate the trial court decision that, as a matter of fact and law, the Petitioners' parody constitutes "fair use."

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In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

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Question Presented

Whether petitioners' song that arguably parodied respondent's well-known copyrighted song was a "fair use" of the copyrighted song, where petitioners' song copied extensively from the copyrighted song, relied for its music almost entirely on the melodic refrain and musical "heart" of the copyrighted song, and was then marketed to hundreds of thousands of record buyers as part of a "rap" album on which it was advertised as respondent's copyrighted song.

Rule 29.1 Listing

Acuff-Rose Music, Inc. is a Tennessee corporation. It is a wholly-owned indirect subsidiary of Gaylord Entertainment Company, a publicly held corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.1 Listing	ii
Table of Authorities	v
STATEMENT OF THE CASE	1
Nature of the Action	2
The District Court Proceedings	4
The Sixth Circuit Decision	6
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. WHETHER A PARODY IS A FAIR USE SHOULD BE DETERMINED ON A CASE-BY-CASE BASIS	10
A. Affording Special Treatment to Parody Would Not Serve the Goals of the Copyright Act	12
B. Parody Requires No Special First Amendment Treatment in the Fair Use Analysis	19

Page

II. 2 LIVE CREW'S "PRETTY WOMAN" IS NOT A FAIR USE OF "OH, PRETTY WOMAN" 21

A. 2 Live Crew's Exploitation of the Commercial Appeal of the Copyrighted Song Was Presumptively Unfair 22

B. "Oh, Pretty Woman's" Nature as A Creative Musical Composition Weighs Against A Fair Use Defense 28

C. 2 Live Crew Copied Excessively From "Oh, Pretty Woman" 30

1. 2 Live Crew Could Not Take More Than was Reasonably Necessary to Conjure Up "Oh, Pretty Woman" 30

2. 2 Live Crew Has Taken Far More of "Oh, Pretty Woman" Than Necessary to Reasonably Accomplish Any Parodic Purpose . 33

D. 2 Live Crew Failed to Show That Its Commercial Exploitation of the Copyrighted Song Would Not Affect the Potential Market For or Value of "Oh, Pretty Woman" 36

CONCLUSION 42

Page(s)

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Page(s)

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Page(s)

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No. 92-1292

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a/ FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX, professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF ON THE MERITS FOR RESPONDENT

STATEMENT OF THE CASE

Contrary to the impression petitioners and amici create, this case is not about whether parody can ever be a fair use if it is sold for a profit. This case is about whether petitioners, whatever the claimed parodic purpose of their song, were principally engaged in an unfair attempt to cash in on the commercial appeal of respondent's copyrighted musical composition. The resolution of that question turns on the particular facts of this case.

Nature of the Action

This is a copyright infringement action concerning a song recorded by petitioners, members of the highly successful rap group known as 2 Live Crew. (J.A. 87) The 2 Live Crew recording, entitled "Pretty Woman," purportedly parodies the well known copyrighted musical composition, "Oh, Pretty Woman"—a pop music classic written in 1964 by Roy Orbison and William Dees. (J.A. 143) Respondent Acuff-Rose is the assignee of the copyright to "Oh, Pretty Woman." (J.A. 143, 17)

2 Live Crew recorded "Pretty Woman" in March, 1989 and released it in June, 1989, as part of an album entitled *As Clean As They Wanna Be*. (J.A. 85, J.A. 228) The album and compact disc covers and the inner labels identify the song simply as "Pretty Woman" written by Orbison and Dees and published by Acuff-Rose.[1] (Campbell Aff. Ex. C)

The 2 Live Crew recording of "Pretty Woman" copies verbatim the opening lyrics of "Oh, Pretty Woman" and copies exactly its introductory guitar "riff"[2]—the indisputable musical "heart" of the copyrighted song—and its initial melodic refrain. (*See* J.A. 32, 140) As in the copyrighted song, the guitar riff and the melodic refrain are repeated throughout the 2 Live Crew version. Indeed, the music of the 2 Live Crew recording consists of little else, except for the injection of certain rap conventions.

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[1] The covers and labels also identify BMI. The copyright to a musical composition includes the right to record the song and the separate right to publicly perform the song. *See* 17 U.S.C. § 106(1) and (4). Acuff-Rose owns the entire copyright including the recording rights, and has licensed BMI to administer the performance rights in the United States.

[2] A "riff" is "a constantly repeated musical phrase used especially as background for a soloist or as the basic theme of a final chorus." Webster's New World Dictionary (3d ed. 1988).

(*Compare* Complaint, Ex. D *with* Complaint, Ex. E).[3] The 2 Live Crew version, however, after copying the opening lyrics of the copyrighted song, changes the original lyrics. Unlike the original lyrics that are about a lonely man's romantic longing for a pretty woman he sees walking down the street, 2 Live Crew's verses taunt a succession of unappealing women, including a "big hairy woman," a "bald headed woman" and a "two timin' woman." (J.A. 24-25)

On July 5, 1989, after their recording of "Pretty Woman" was already released (J.A. 84-85), 2 Live Crew's manager asked Acuff-Rose for a license for "Oh, Pretty Woman." (J.A. 87-88) Describing 2 Live Crew as "one of the most successful rap groups in the country today," whose albums "have gone Gold and are close to Platinum,"[4] she goes on to say:

> At the time of this writing the Group [2 Live Crew] has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain [sic] to what Weird Al Yankovic and other satirical artists are doing.

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[3] At several points, 2 Live Crew injects a scraping sound or "scraper" (probably produced by scraping a record turntable arm over a record) and one member of the group sings off key. These stylistic additions are typical of rap. *See* Richard Shusterman, *The Fine Art of Rap*, 22 New Literary History 613, 617 (1990); Catherine I. Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. of Negro Education 245, 245-46 (1991); Alan Light, *About a Salary or Reality?—Rap's Recurrent Conflict*, 90 South Atlantic Quarterly 855, 862 (1992).

[4] A "gold" record is a record that has sold at least 500,000 copies. *See United States* v. *Music Masters*, 621 F. Supp. 1046, 1050 (W.D.N.C. 1985), *aff'd*, 816 F.2d 674 (4th Cir. 1987). A "platinum" record is a record that has sold at least 1,000,000 copies. *Id.*

> We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.
>
> Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a novelty record that will be heard by hundreds of thousands of new listeners in their homes.

(*Id.*) On July 17, 1989, Acuff-Rose refused the request, stating that "we cannot permit the use of a parody of 'Oh, Pretty Woman'." (J.A. 89)

2 Live Crew nevertheless continued to market the album containing "Pretty Woman" and by August, 1990 had sold 248,000 copies. (J.A. 85) In June, 1990 Acuff-Rose brought this suit for infringement of the copyright to "Oh, Pretty Woman."

The District Court Proceedings

The elements of copyright infringement were never contested below. Instead, petitioners made a motion to dismiss the complaint (J.A. 28), later converted into a motion for summary judgment (*see* J.A. 99), contending that their recording of "Pretty Woman" was a parody that fell within the "fair use" exception to the copyright monopoly codified in Section 107 of the Copyright Act of 1976 (the "Copyright Act").[2/]

[2/] Section 107 of the Copyright Act, 17 U.S.C. § 107 (Supp. 1993) provides:

> Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom (continued...)

The district court granted the motion for summary judgment. It concluded that the 2 Live Crew version was a comic parody of "Oh, Pretty Woman" that made fair use of the copyrighted song because it "appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose," 754 F. Supp. at 1157, and because it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original." *Id.* at 1158. In reaching this latter conclusion, the District Court found that the 2 Live Crew version and the original Orbison song were aimed at different audiences. *Id.* This conclusion reflected affidavit testimony that contended that the original Roy Orbison recording of the copyrighted song was directed to a middle class country audience, while the 2 Live Crew recording was directed to an audience of a "disaffected" "black populace who used to buy what were once called 'race' records." (*See* J.A. 35; *see also* J.A. 95) The district court brusquely rejected the contention that the 2 Live Crew recording could

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[2/](...continued)

> use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

adversely affect Acuff-Rose's right to market future derivative works of the copyrighted song,[2] including rap versions of the work, with the observation that since 2 Live Crew's recording "is a parody, that [recording] has not prevented Acuff-Rose from recording whatever version of the original it desires." 754 F. Supp. at 1158.

The Sixth Circuit Decision

A two-to-one majority of the Sixth Circuit reversed. Concluding that the material facts were not in dispute and that only a legal judgment based on the facts was involved, 972 F.2d at 1434, the Sixth Circuit held that a review of the four statutory factors did not support a finding of fair use. *Id.* at 1439.

With regard to the first factor (purpose and character of the use), the Sixth Circuit majority expressed "considerable reservation" that the 2 Live Crew recording was a "parody" in any legal sense, but assumed for purposes of the appeal that it was. 972 F.2d at 1435 & n.8. The court, nevertheless, found that the admittedly commercial purpose of the use required a finding against fair use on the first factor. *Id.* at 1437.

The Sixth Circuit recognized that "commercial purpose is not itself controlling on the issue of fair use," *id.* at 1436–37, but found that "the district court placed insufficient emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holding that '[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.'" *Id.* at 1437, *quoting Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 562 (1985) (citation omitted).

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[2] One of the rights belonging to the copyright owner, Acuff-Rose, is the right to make a derivative work, which is defined in the Copyright Act as a work "based upon one or more preexisting works, such as a ... musical arrangement ... sound recording ... or any other form in which a work may be recast, transformed or adapted." 17 U.S.C. § 101.

The Sixth Circuit majority therefore started from the presumption that 2 Live Crew's commercial recording was not a fair use, but then proceeded to consider whether 2 Live Crew "met its burden to rebut the presumption by a defense ... requiring the court to be convinced that the 'parody does not unfairly diminish the economic value of the original.'" *Id.* (citation omitted).

The Sixth Circuit found that the second factor (nature of the work) also weighed against fair use in view of the creative nature of the copyrighted work. *Id.* It next found that, because taking the "heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original," *id.* at 1438, the facts developed under the third factor (amount and substantiality of the portion used in relation to the copyrighted work as a whole) "cannot be used in any way to support a finding of fair use." *Id.*

In assessing the fourth factor (the effect on the potential market for or value of the copyrighted work), the Sixth Circuit emphasized this Court's direction in *Harper & Row* that consideration must be given to potential harm not only to the original but also to the market for derivative works. *Id.* Moreover, relying on this Court's opinion in *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), the Sixth Circuit determined that where, as here, the use of the copyrighted work is for commercial purposes, the likelihood of future harm is presumed. 972 F.2d at 1438. The Sixth Circuit then determined that this presumption had not been overcome by the evidence relied on by the district court because that evidence failed to address the potential harm to the market for derivative works. *Id.* at 1439. It therefore held that "the record on [the fourth factor] does not support a finding of fair use." *Id.*

SUMMARY OF ARGUMENT

This case demonstrates the soundness of this Court's insistence that no uses of copyrighted material, even such uses as news reporting and others specifically enumerated in the preamble to Section 107, are to be treated as presumptively fair, but must be evaluated on a case-by-case basis under equitable considerations that include at least the four factors listed in Section 107.

Here, the excessive appropriation of the copyrighted work together with the mass marketing of "Pretty Woman" as the copyrighted work itself leave no doubt that, whatever their parodic purpose, 2 Live Crew sought to cash in on the commercial appeal of "Oh Pretty Woman" and to take for themselves profits that the Copyright Act intended as incentives for the creators of the original song.

It is these circumstances that render the use presumptively unfair. The "commercial use" presumption enunciated in *Sony* and relied upon by the Sixth Circuit does not apply merely because a user makes a profit. As this Court explained in *Harper & Row*, it applies where a user, notwithstanding the arguable social benefits of his use, seeks primarily to profit from the commercial value of the copyrighted work itself. In those circumstances, the "commercial use" presumption quite reasonably requires the user to bear the burden of proving that the use will not harm the potential market for, or value of, the copyrighted work.

The Sixth Circuit correctly concluded that petitioners failed to meet their burden. Indeed, as we shall demonstrate, all four statutory factors weigh convincingly against fair use, whether or not the commercial use presumption applies.

Petitioners and amici have undoubtedly forgotten Justice Cardozo's warning about the "tyranny of labels."[2] Ignoring the specific facts of this case, petitioners and amici simply equate "parody" with "fair use." Some argue for presumptions of fair use for "parody," others urge that "parody" be protected as fair use *per se*, either under the Copyright Act or the First Amendment, and all urge the Court to effectively ignore some—or even all—of the statutory factors if the label "parody" can be affixed.

It is evident, however, from the many learned examples furnished by petitioners and amici that "parody" is a vast tent that covers many species, some that would not raise any copyright infringement concerns at all; others that would unquestionably amount to fair use under any test; and others—such as the "parody" in this case—that seriously jeopardize the legitimate interests of copyright owners and the incentives to creativity that the Copyright Act seeks to foster.

Moreover, the definition of "parody" is malleable and could be applied to virtually every humorous modification of a copyrighted work. The exclusive focus on "parody" thus could open the door to piracy. This danger is especially serious in the case of copyrighted songs, where it is the music that frequently provides their main appeal. Songs are thus particularly susceptible to unfair use by "parodists" who, despite their humorous modifications of the original lyrics, are primarily exploiting the commercial appeal of the original music.

Further, music has an appeal that transcends differences of culture, language and class. Particularly through adaptation of style or lyrics, it can be sold to a variety of audiences. Here, petitioners never offered any evidence to overcome the unavoidable inference, let alone the presumption, that their commercial exploitation of the "heart" of respondent's pop classic "Oh, Pretty Woman" would interfere with respondent's future

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[2] *Snyder* v. *Massachusetts*, 291 U.S. 97, 114 (1934), *overruled on other grounds by Malloy* v. *Hogan*, 378 U.S. 1 (1964).

opportunities, through "rap" versions or other adaptations, to sell their song to the vast audience to which petitioners sold "Pretty Woman." The suggestion here, that music is either for "whites" or "blacks" and that petitioners' recording or respondent's potential market is confined to only one of these audiences, is simply wrong.

In sum, a cautious application of the statutory factors on a case-by-case basis is essential if owners of musical copyrights are not to be deprived of revenues that have traditionally served as incentives to musical creativity and parody is not to be permitted to serve as a disguise for piracy.

ARGUMENT

I.

WHETHER A PARODY IS A FAIR USE SHOULD BE DETERMINED ON A CASE-BY-CASE BASIS

In *Harper & Row*, this Court made clear that there are no presumptive fair uses and that the invocation of the fair use defense in any particular case must be subjected to analysis under at least the four statutory factors. *See* 471 U.S. at 561. This is evident from the face of the statute. Section 107 specifies that fair use of a copyrighted work for purposes "such as criticism, comment, news reporting, teaching ..., scholarship, or research is not an infringement of copyright." 17 U.S.C. § 107. It then goes on to say that "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include" the four statutory factors. *Id.* As this Court explained:

> [The statutory] listing was not intended ... to single out any particular use as presumptively a "fair" use. The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision

> as an affirmative defense requiring a case-by-case analysis. *See* H.R. Rep. No. 83, 90th Cong., 1st Sess., 37 (1967); Patry 477, n.4. "[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence." Senate Report, at 62.

Harper & Row, 471 U.S. at 561.

In amending Section 107 in 1992, Congress reaffirmed this intent, stating "courts are to determine the affirmative defense of fair use ... on a case by case basis." H.R. Rep. No. 836, 102d Cong., 2d Sess. at 1 (1992). It further noted that even the uses enumerated in the statute "are not ... presumptively fair." *Id.* at 3.[9]

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[9] Certain of the amici claim (ACLU Br. at 25; Capitol Steps Productions, Inc. *et al.* Br. at 22) that Congress's clear intent to avoid creation of any presumptive fair uses does not apply in the case of parody because of the following sentence in the 1975 Senate Report:

> With certain exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.

S. Rep. No. 473, 94th Cong., 1st Sess. at 65 (1975). The House dropped this puzzling language, which had appeared in earlier drafts, from its final report. *Compare* H.R. Rep. No. 2237, 89th Cong., 2d Sess. at 64 (1966) *with* H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976). The cryptic sentence in the Senate Report is, therefore, entitled to no weight, especially in light of other portions of the legislative history reflecting the understanding that a parody could not be a fair use unless it was "not competitive with the copyright owner's market for his work." *Copyright Law Revision: Report of the Register of Copyrights*, 87th Cong., 1st

(continued...)

Petitioners and the amici nevertheless urge this Court to ignore *Harper & Row*, the statutory language and the legislative history and accord all "parody" the status of a presumptive fair use. *See, e.g.*, Petitioners Br. at 10-13; ACLU Br. at 24-25. Indeed, petitioners and the amici expressly or implicitly demand even more—that parody be deemed not just presumptively but conclusively fair and subject to protection under the First Amendment. *See e.g.*, Petitioners Br. at 10-39; Concerned Law Profs. Br. at 18-27; Home Box Office *et al.* Br. ("HBO Br.") at 22-30; Capitol Steps Productions, Inc. *et al.* Br. ("Capitol Steps Br.") at 15-17. They would elevate parody to an exalted status unique among potential fair uses, treating parody as more important to our society and our democracy than news reporting, education and scholarship, criticism or political and social commentary, categories of fair use which, unlike parody, are expressly enumerated in Section 107. *See, e.g.*, Harvard Lampoon Inc. Br. at 13 (describing parody as the "most productive of all possible uses"). In their zeal to praise parody, they also are oblivious to the incentive provided by copyright protection to create new and original works—without which there would be nothing to parody.

A. Affording Special Treatment to Parody Would Not Serve the Goals of the Copyright Act

The special treatment petitioners and amici would afford parody would be subversive of the goals of the Copyright Act. Such special protection is also wholly unnecessary. The Copyright Act and the fair use exception as currently interpreted properly

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[8](...continued)
Sess. 24 (House Comm. Print 1961). *See* Alan Latman, *Study No. 14: Fair Use of Copyrighted Works* 9-10 in *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee*, 86th Cong., 1st Sess. (Comm. Print 1960).

reconcile the interests of authors and composers of copyrighted original works with the societal interests that may be served by parody.

As petitioners and amici demonstrate, there are a number of definitions of parody. *See, e.g.*, Petitioners Br. at 10-11; HBO Br. at 5-6 & n.3. Under some definitions, parody is any work that mimics the style or content of the original but makes changes that produce comic effects, *see* Oxford English Dictionary (1982); under others the existing work is used as a vehicle for political or social satire, *see* Capitol Steps Br. at 19; and others require that the parody must not merely use the original for comic effect but must make some critical comment about the style or expression of the original. *See Rogers* v. *Koons*, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

Most courts insist that, to constitute a parody for fair use analysis, the use must meet the last definition—there must be some critical comment about the original. *See id.*; *Fisher* v. *Dees*, 794 F.2d 432, 437 (9th Cir. 1986); *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 185 (2d Cir. 1981); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 758 n.15 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *New Line Cinema Corp.* v. *Bertlesman Music Group*, 693 F. Supp. 1517, 1525 (S.D.N.Y. 1988); *Metro-Goldwyn-Mayer* v. *Showcase Atlanta Cooperative Productions*, 479 F. Supp. 351, 357 (N.D. Ga. 1979). This definition is the most appropriate because it at least attempts to confine the category of parody to situations where there is a need to make use of some of the content of a specific original work. Parodies that use another work merely as a vehicle for humor or social or political commentary do not need to appropriate copyrighted works to achieve their purpose. *See Rogers*, 960 F.2d at 310; *MCA*, 677 F.2d at 185; *Air Pirates*, 581 F.2d at 758 n.15.[9]

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[9] *See also* II Paul Goldstein, *Copyright: Principles, Law and Practice* § 10.2.1 at 211 (1989); Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act*, ASCAP Copyright Law Symposium No. 34 (1987) at 23.

But whether a work can be made to fit this legal definition of parody—or any other—cannot resolve the fair use issue. To begin with, the boundaries established by such definitions are essentially an illusion. This case illustrates that almost any work that modifies the original for comic effect might also be interpreted as a social or political commentary or a comment on the original work. It is all in the eye (or ear) of the beholder.

Thus, 2 Live Crew's manager portrays their version as merely "humorous." (J.A. 87) The Sixth Circuit majority concluded that the 2 Live Crew version does not make "ridiculous the style and expression of the original, although there is plainly an element of the ridiculous to the new work." 972 F.2d at 1435-36 n.8. Judge Wiseman read the 2 Live Crew version to derisively demonstrate how bland and banal the Orbison song seems. 754 F. Supp. at 1155. Judge Nelson says that, whereas the original is "romantic" and merely implicitly sexual, 2 Live Crew's version "reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences" and that, while the original may not seem vulgar, "vulgar is precisely what 'Oh, Pretty Woman' is." 972 F.2d at 1442, 1446 (Nelson, J., dissenting). Meanwhile, the author, Luther Campbell, maintains that his work was an attempt through "comical *lyrics*, to satirize the original work" (J.A. 84) (emphasis added); while petitioners' expert, the folk musician and musical historian, Oscar Brand, finds a "musical joke" under every rap music convention. (J.A. 32)

We agree with the Sixth Circuit majority interpretation, but we also recognize that an imaginative deconstruction of the song also could produce any or all of the other interpretations. It would not be difficult to find similar latent meanings meeting any of the definitions of parody in any work that humorously modifies an original work in some respect. To allow a determination of fair use to turn primarily or presumptively on whether the use fits one of these definitions is dangerous for both copyright owners and parodists. It is dangerous to copyright owners because it would permit the piracy of their works merely through the addition of

elements of humor. It is dangerous to parodists because any attempt to pretend that one of the narrower definitions controls would allow courts to make fair use determinations based on entirely subjective judgments. The Sixth Circuit, therefore, was correct in refusing to allow its fair use determination to turn on whether "Pretty Woman" was a "legal" parody and in basing its analysis on a review of the four factors in light of the record facts.

This approach is particularly appropriate in dealing with sound recordings of musical compositions. Copyrighted songs are especially susceptible to piracy masquerading as parody. It is frequently the catchy tune or the memorable melody that sells the song.[10/] Careful analysis under the four factors is necessary to assure that "parodists" of copyrighted songs cannot unfairly appropriate the commercial value of copyrighted music merely because they make humorous modifications to the lyrics.

Moreover, parodies of musical works require closer scrutiny under the fair use analysis for another reason. Authors of musical works are granted a more limited monopoly than authors of other works. Under Section 115 of the Copyright Act, after the first recording of a musical work is distributed, anyone is entitled to record the work provided they pay the statutory rate and meet

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[10/] *See* Bob Monaco and James Riordan, *The Platinum Rainbow*, 48-50 (1988) ("Hit songs usually have a melodic line that is very catchy and infectious. It may have lyrics that are the focal point of the song. This part usually repeats throughout the tune and it is the part most people remember when they think of the song. This is the hook, and hit songs are built on good hooks. There are instrumental and rhythm hooks as well as vocal ones."); Edward Rothstein, *How Long Will Melody Linger On?*, New York Times, April 18, 1993, § 2, at 23.

the other terms of the statutory compulsory license.[11] The compulsory license, however, contains an important limitation. The compulsory license is only available if the arrangement of the work does not "change the basic melody or fundamental character of the work." 17 U.S.C. § 115(a)(2). Congress inserted this limitation so that the owner could prevent his musical work from being "perverted, distorted or travestied." H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 109 (1976).

Thus, Congress must have intended that at least some versions of the song that "distort" or "travesty" the original could

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[11] 17 U.S.C. § 115 provides in pertinent part:

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) Availability and Scope of Compulsory License.

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use.

...

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

be forbidden by the copyright owner. "Travesty" and "distortion," however, necessarily overlap with parody; parodies frequently "travesty" or "distort" the original.[12] We do not suggest that Congress in Section 115 intended to outlaw all musical parodies that travesty the original. Nevertheless, to give some meaning to the limitation imposed by Congress, distinctions must be drawn between parodies that travesty or distort the original that are fair uses and those that are not. To label every "parody" a fair use would nullify Congressional intent.

The special treatment petitioners and amici seek for "parody" is also unnecessary. As the amicus briefs so copiously detail, parody has flourished without any of the presumptions or *per se* tests amici now propose. Since the first cases involving parody, courts have refused to treat the presence of parody as dispositive of the fair use inquiry, but have reviewed each case on all its facts. *See, e.g., Loew's, Inc.* v. *Columbia Broadcasting System*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny* v. *Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958); *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Fisher* v. *Dees*, 794 F.2d 432 (9th Cir. 1986).

Further, many of the examples of parody listed by amici do not even implicate the copyright laws because they either are parodies of a style or genre that copy little, if anything, of any specific work (*e.g., Don Quixote* (*see* Harvard Lampoon Br. at 7)); or are so transformative of the work parodied that they cannot be viewed as "substantially similar" to the original (*e.g.*, Joyce's *Ulysses* (*see* HBO Br. at 7 n.6)); or rely on works in the public domain (*e.g.*, Duchamp's parodies of Mona Lisa (*see* ACLU Br. at 16)). Other examples are obviously fair uses, if they would be copyright infringements at all, because they take so little from the

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[12] "Travesty ridicules lofty characters by putting them in a mundane setting." Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L.Rev. 1395, 1395 n.1 (1984).

original (*e.g.*, Lewis Carroll's parodies of Southey or Watts (*see* PEN American Center Br. at 7–8)) or are so clearly not attempts to exploit the commercial appeal of the original (*e.g.*, Beerbohm's parodies of Henry James (*see* ACLU Br. at 13–14)).

Petitioners and amici argue that parodies deserve special treatment because there is a "market failure"; they claim parodists are unable to obtain copyrighted material through the usual operation of a licensing market since copyright owners are unlikely to be willing to license effective parody for any price. *See*, *e.g.*, Petitioners Br. at 16–17; Concerned Law Profs. Br. at 11-14; HBO Br. at 23–24. The substantial business in the licensing of parodies undercuts this "market failure" assumption (J.A. 325); *see also* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600, 1635 (1982). But, even if the assumption were correct, it would not justify a presumption of fair use. Most, if not all, of the uses listed in the preamble to Section 107 are likely to involve market failure because there are a variety of obstacles to obtaining such licenses through the normal operation of a copyright licensing market. These include the copyright owner's dislike for the use (*e.g.*, criticism), transactional costs which render a license impractical (*e.g.*, classroom use) or the need for a timely use that makes licensing effectively impossible (*e.g.*, news reporting). *Id.* at 1633. Yet, Congress made it clear that none of these uses was entitled to a presumption of fair use. *See supra*, at pp. 10-11.

Petitioners and amici also argue that parodies should be presumptively fair uses because they are unlikely to compete with the original. *See* Petitioners Br. at 35; ACLU Br. at 24–25. But no such generalization is possible. Parody's potential for harm to the copyright owner's markets for the original and its derivatives varies widely depending on many factors, such as the degree of commercial exploitation of the original work; the breadth of the markets for the copyrighted work and its derivatives as well as the breadth of the audience to which the so-called parody is directed; the amount and importance of the copyrighted work taken; and the

manner and the medium in which the so-called parody is marketed. There is a vast difference between the potential effect on the copyright owner's markets of a live, one-night performance, for example, and the widespread commercial exploitation of the copyrighted song on a recorded album that is the subject of this case.

B. Parody Requires No Special First Amendment Treatment in the Fair Use Analysis

Nor, finally, does the invocation of the First Amendment lend any weight to petitioners' and amici's pleas for special protections for parody. As one amicus candidly concedes, "Courts uniformly reject First Amendment defenses to copyright claims." (Concerned Law Professors Br. at 19; *see also* HBO Br. at 12–13); *see also Twin Peaks Productions, Inc.* v. *Publications International, Ltd.*, 1993 U.S. App. LEXIS 13454 *29–30 (2d Cir. June 7, 1993). As this Court explained in *Harper & Row*, there is no need for a separate First Amendment analysis because First Amendment protections are "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." 471 U.S. at 560. Thus, even in the context of political news reporting, which lies at the core of First Amendment concerns, this Court was content to evaluate a fair use defense to copyright infringement with sole reference to "the traditional equities of fair use." *Id.*

Moreover, petitioners and amici overlook the point, made in *Harper & Row*, that every fair use analysis implicates First Amendment values on both sides of the controversy. The protections afforded the copyright owner are themselves an "engine of free expression," supplying authors with "the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558. This distinguishes fair use controversies from all of the First Amendment cases cited by petitioners.

Further, copyright affords authors a property interest in their unique expression, *see Loew's Inc.*, v. *Columbia Broadcasting System*, 131 F. Supp. 165, 183 (S.D. Cal. 1955), *aff'd sub nom. Benny* v. *Loew's, Inc.* 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958), while there is no corresponding property interest at stake in the flag-burning or libel cases cited by amici. Indeed, a flag-burning statute aimed solely at protecting a state's property interest in a flag would be valid, regardless of the expressive intent of the flag burner. *See United States* v. *Eichman*, 957 F.2d 45, 47 (2d Cir. 1992); *Spence* v. *Washington*, 418 U.S. 405, 409 (1974) (per curiam). This Court also has held that a person could not constitutionally be forced to use his expressive property to further the expressive interests of another. *See Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (holding that a right of reply statute providing mandatory access to a newspaper by political candidates to answer criticisms of their record by the newspaper would violate the First Amendment rights of the newspaper.) In *Tornillo* the Court was unmoved by the claim, also made here, that the use of appellant's expressive property was especially needed to further the message of appellee. *See id.* at 248-51. Surely, parodists have no constitutional right to force a copyright owner to place its expression at the service of the parodist.

Nor is it impermissible "censorship" to allow a copyright owner to refuse to license a parody. *See* Concerned Law Profs. Br. at 20-27. If parody is a fair use then the owner's refusal to license is futile; if the parody is not a fair use, the owner's motive in exercising its rights under the copyright monopoly are no more relevant than they would be if an author of a novel refused to license a particular movie interpretation of the work. Moreover, no copyright owner can censor the critical ideas that underlie the parody. *See New York Times Co.* v. *United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed).

To import the First Amendment into the fair use analysis would rigidify a doctrine whose strength lies in its flexible, case-specific application. Congress recognized, in codifying the fair use defense, that "the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute." H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 66 (1976). A sensitive application of the "traditional equities" of the fair use doctrine is all that is required to confer the needed protection to criticism and parody.

II.

2 LIVE CREW'S "PRETTY WOMAN" IS NOT A FAIR USE OF "OH, PRETTY WOMAN"

Section 107 of the Copyright Act lists four factors that are not exclusive, but that must be included in any fair use analysis. The factors are to be applied "in concert," to give an overall picture of the fairness of the use. *Meeropol* v. *Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). For example, evidence under the first factor (nature and purpose of the use) that the user is commercially exploiting the copyrighted material is relevant to the fourth factor (effect on potential market for or value of the copyrighted work). Similarly, evidence under the third factor (amount and substantiality of the portion taken) is relevant to both the first factor and the fourth factor; the amount taken bears on the real purpose and character of the use and the likelihood of economic harm to the copyright owner. The second factor (the nature of the work) bears on the nature and scope of the potential market that is the subject of the fourth factor.

In assessing the evidence under these factors, it bears emphasis that fair use is an affirmative defense, *see Harper & Row*, 471 U.S. at 561, and that, accordingly, the burden of proving fair use lies with the proponent of the defense. H.R. Rep. No. 836, 102d Cong., 2d Sess. at 3 n.3 (1992); *Rubin* v. *Boston Magazine Co.*, 645 F.2d 80, 85 (1st Cir. 1981); *Ass'n of*

American Medical Colleges v. *Mikaelian*, 571 F. Supp. 144, 151 (E.D. Pa. 1983), *aff'd*, 734 F.2d 3 (3d Cir. 1984).

Here, the Sixth Circuit concluded that petitioners did not carry their burden. As we now show through analysis of the evidence in light of the four factors, the Sixth Circuit was correct.

A. *2 Live Crew's Exploitation of the Commercial Appeal of the Copyrighted Song Was Presumptively Unfair*

The first § 107 factor directs courts to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes... ." Petitioners and amici, like the district court, would award this factor to 2 Live Crew solely on the basis that the use is a "parody." They totally ignore the statutory command to consider the commercial nature or purpose of the use. They also misconstrue the "commercial use" presumption applied by the Sixth Circuit and enunciated by this Court in three decisions in the last decade. Those decisions state: "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony*, 464 U.S. at 451; *accord Stewart* v. *Abend*, 495 U.S. 207, 237 (1990); *Harper & Row*, 471 U.S. at 562.

Petitioners and the amici criticize this presumption on the ground that it threatens to make virtually all parodies (and other categories of potential fair uses) presumptively unfair, because parodists typically seek to profit from their work. *See, e.g.*, Petitioners Br. at 20; Warner Bros. Br. at 10–11; HBO Br. at 14–16. The presumption, however, does not apply merely because the user makes a profit. Rather, it applies where the user is capitalizing primarily on the commercial appeal of the copyrighted material itself, as might be evidenced by the amount and importance of the copyrighted material taken or the emphasis given to the copyrighted material in the marketing of the work. *Harper & Row* makes this distinction clear.

In *Harper & Row*, The Nation gained access to the unpublished manuscript of President Ford's memoirs and published an article describing the memoirs. 471 U.S. at 543. The article included verbatim excerpts consisting of 300 words from the 200,000-word memoirs. *Id.* at 545. In asserting a fair use defense to copyright infringement claims, The Nation argued that, although the publication was for profit, its purpose was news reporting and news reporting was not purely commercial. *Id.* at 562. In responding to this claim—which is much like the claim of parodic purpose made here—this Court explained:

> In arguing that the purpose of news reporting is not purely commercial, The Nation misses the point entirely. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.

Id.

The Court held that, although the publication was arguably news reporting, the circumstances demonstrated that the overriding purpose of the publication was "to exploit the headline value of its infringement." *Id.* at 561. The article in question referred to the original work in its title. *Id.* at 542. It included the 300 quoted words that were the "heart of the book" and which assured that "the reader would know it was Ford speaking and not The Nation." *Id.* at 568. Furthermore, the work was intended to "scoop" the publication of the original work and the licensed abstracts, thus showing that it was designed to take advantage of prepublication interest in the original and to serve the same purpose as the licensed abstracts. *See id.* at 562. The presumption was triggered because, even though the work appeared in a news

report, the copyrighted work was exploited for its inherent commercial value.[13]

Lower court cases applying this presumption have turned on the same analysis. *See Hi-Tech Video* v. *Capital Cities/ABC*, 804 F. Supp. 950, 955 (W.D. Mich. 1992) (news report presumptively unfair where it exploited the inherent value of plaintiff's promotional videotape of Mackinac Island by using videotape in news report describing island); *New Line Cinema* v. *Bertlesman Music Group*, 693 F. Supp. 1517, 1526 (S.D.N.Y. 1988) (presumption applied where defendant commercially exploited value of plaintiffs' copyrighted movie in its music video); *Original Appalachian Artworks* v. *Topps Chewing Gum*, 642 F. Supp. 1031, 1034-35 (N.D. Ga. 1986) (presumption applied to alleged parody of Cabbage Patch Dolls where defendant hoped to profit primarily by association of his product with the popular, parodied product). *Cf. Penelope* v. *Brown*, 792 F. Supp. 132, 137 (D. Mass. 1993) (in finding lack of commercial exploitation, emphasis placed on fact that inclusion of the copied material was not made evident to prospective purchasers of book).[14]

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[13] Certain amici argue that *Harper & Row's* inquiry into "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price," 471 U.S. at 562, has no application to parody because parody is not a use which is licensed and thus has no customary price. *See, e.g.*, HBO Br. at 15. But amici miss the point. The issue is whether, even if the use has elements of parody, the user is primarily exploiting the inherent commercial value of the copyrighted work. Whether "parody" has a customary price is irrelevant. The underlying copyrighted material that is being commercially exploited by the user certainly does.

[14] This Court gave the same interpretation to *Harper & Row* in a subsequent case involving the alleged wrongful appropriation of the word "Olympic." *See San Francisco Arts & Athletics* v. *U.S.O.C.*, 483 U.S. 522, 541 n.19 (1987). Relying on the language from *Harper & Row* quoted above at p. 23, this Court held that the use of the statutorily (continued...)

Earlier cases have also focused on whether the use constituted "commercial exploitation." *See D.C. Comics Inc.* v. *Unlimited Monkey Business*, 598 F. Supp. 110, 119 (N.D. Ga. 1984) (no fair use where creator of "Superstud" singing telegram relied on inherent value of copyrighted "Superman" rather than the originality and imagination of his parody for market appeal); *Iowa State University* v. *American Broadcasting Companies, Inc.*, 621 F.2d 57, 61 (2d Cir. 1980) (ABC telecasts containing portions of film on wrestler were "commercial exploitation"); *Meeropol* v. *Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977) (summary judgment determining fair use inappropriate since book containing Rosenberg letters could constitute "commercial exploitation"), *cert. denied*, 434 U.S. 1013 (1978).

The facts here demonstrate that the "commercial use" presumption should apply because, whatever its parodic purpose, 2 Live Crew is primarily profiting from the commercial appeal of the copyrighted song.

In the first place, 2 Live Crew marketed the song not as a parody, but as the copyrighted work itself. 2 Live Crew's version of the Orbison/Dees song is listed on their album and compact disc covers and the inner labels simply as "Pretty Woman," written by Orbison and Dees and published by Acuff-Rose. (Campbell Aff. Ex. C) This contrasts with all the other songs on the album, which are attributed to the group's leader, Luther Campbell. (*Id.*) Thus a prospective purchaser examining the album would simply conclude that "Pretty Woman" is a 2 Live Crew recording of the original Orbison and Dees work, without additional music or changes.

Nothing on the album indicates that Pretty Woman is a parody of the original. Moreover, 2 Live Crew is, by its own

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[14](...continued)
protected word by a nonprofit corporation to promote "Gay Olympic Games" was nonetheless a "clear attempt to exploit the imagery and goodwill created by USOC." *Id.*

admission, "one of the most successful rap groups in the country..." (J.A. 87), not a parody ensemble. The group has enjoyed substantial commercial success from "Gold" albums ranked on the Billboard "Rap Chart." (*Id.*) The 2 Live Crew audience would believe it is buying a rap performance of the original copyrighted song "Oh, Pretty Woman."

These facts stand in sharp contrast to the way other commercial parodies are marketed and sold. In all of the scores of parodies cited in the briefs of petitioners and the amici, the name of the parody is changed from that of the original to indicate and highlight the parody intended.[15] In addition, many parodic works bear designations of their character on their exteriors, *see, e.g.*, *Cliff Notes* v. *Bantam Doubleday Dell Publishing Group*, 886 F.2d 490, 492 (2d Cir. 1989) (parody of Cliff Notes stating prominently on cover, "A satire"); *Berlin*, 329 F.2d at 543 (work billed as a "collection of parody lyrics"). Others are offered in a live or televised comedy revue by performers known for their parody, *see, e.g.*, *Elsmere Music, Inc.* v. *National Broadcasting Co.*, 482 F. Supp. 741, 743 (S.D.N.Y. 1980) (Saturday Night Live), *aff'd*, 623 F.2d 252 (2d Cir. 1980), often in circumstances where the consumers who tune in or pay admission to enjoy

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[15] *See, e.g.*, *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541, 543 (2d Cir. 1964) ("The Last Time I Saw Paris" changed to "The First Time I Saw Maris"; "A Pretty Girl is Like a Melody" changed to "Louella Schwartz Describes Her Malady"), *cert. denied*, 379 U.S. 822 (1964); *Fisher* v. *Dees*, 794 F.2d 432, 434 (9th Cir. 1986) ("When Sunny Gets Blue" changed to "When Sonny Sniffs Glue"); Harvard Lampoon Br. at 2 ("Lord of the Rings" changed to "Bored of the Rings"); HBO Br. at 3 (listing parodies of pop culture icons: "Alladin" changed to "A-lad-Dim," "I Love Lucy" changed to "I Love Luny," "Sports Illustrated" changed to "Sports Titillated"); Petitioners' Br. at n.5 (listing song parodies relating to Iraq's invasion of Kuwait); ACLU Br. at 11 ("Pamela: Or, Virtue Rewarded" changed to "Shamela: An Apology for the Life of Mrs. Shamela Andrews, in which, the many notorious Falsehoods and Misrepresentations of a Book called Pamela are Exposed and Rebutted... .").

parody do not even know what underlying works will be used as vehicles (Capitol Steps Br. Appx. B, Russell Aff. ¶¶ 6, 7, 9).

The extent of the copyrighted material used also shows 2 Live Crew's commercial exploitation of the inherent value of the copyrighted material itself. The most convincing demonstration is to listen to the tapes of "Oh, Pretty Woman" and "Pretty Woman" that are lodged with the Court. (Complaint, Exs. D and E) They demonstrate—and it is not disputed—that 2 Live Crew has taken the most valuable and recognizable parts of the Orbison classic: the "Pretty Woman" refrain and the "distinctive" (Campbell Aff. J.A. 84) and "very recognizable" (Brand Aff. J.A. 32) guitar riff that opens the song and is repeated throughout. Indeed, this riff is copied so exactly that respondent's expert opined that it was probably "sampled"—*i.e.*, electronically duplicated—from the original Roy Orbison sound recording of "Oh, Pretty Woman." (J.A. 140) Such sampling is often employed in rap music to increase the marketability of a song by creating an association with a successful song that the listener will recognize. *See* Note, *A New Spin on Music Sampling: A Case For Fair Pay*, 105 Harv. L. Rev. 726, 727 (1992); *see also* Catherine I. Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. of Negro Educ. 245, 255 (1991) (noting rap groups' frequent inclusion of a "hook" from an "older successful song").

2 Live Crew has also taken much more: It is undisputed that the group adopted the opening percussion measure, the melodic line of the song's verse and bridge sections, the lyrical structures, the key and approximately the same tempo as the original work (J.A. 139-40), changing them only to add elements of the rap style such as a "scraper" and off-key singing by one member of the group. *See* n.3, *supra*. In fact, while 2 Live Crew omits a portion of the music of the original, the *only* music in the 2 Live Crew version is taken from the original. 2 Live Crew took the music from "Oh, Pretty Woman" not to briefly evoke the song, but to create a new commercial version of the song as long as the original—over three minutes, the length of a standard commercially marketable pop music single.

Finally, petitioners mistakenly believe that their offer to pay the "statutory rates" and respondent's refusal to grant them a license on that basis weighs in their favor in the fair use analysis. (J.A. 87, 89; *see* Petitioners Br. at 15) Because petitioners' version of "Oh, Pretty Woman" altered the character of the copyrighted work, a compulsory license at a "statutory rate" was not available. More importantly, petitioners' argument is circular: unless a fair use is involved, respondent was entitled to prohibit the use of its song, because the copyright monopoly permits the copyright owner to decide whether particular uses are the best vehicle for marketing its work. *See Stewart* v. *Abend*, 495 U.S. at 228-29.

This case is thus very much like *Harper & Row*. Petitioners took the "heart" of the copyrighted work (and much more) and marketed it to a vast audience of "hundreds of thousands of new listeners" (J.A. 88) as the copyrighted work itself. In these circumstances, there is every reason to thrust the burden on petitioners to prove that, nevertheless, this massive commercial exploitation of the most appealing features of the copyrighted work did not affect the potential market for the original. That is all that the presumption employed by the Sixth Circuit did. With or without a presumption, the first factor favors respondents.

B. "Oh, Pretty Woman's" Nature as A Creative Musical Composition Weighs Against A Fair Use Defense

The second statutory fair use factor is "the nature of the copyrighted work." Both lower courts held that "Oh, Pretty Woman" is precisely the type of original creative work that should be favored under this factor. *See* 972 F.2d at 1437; 754 F. Supp. at 1155-56.

This proposition is universally accepted. *See Stewart* v. *Abend*, 495 U.S. at 237-38; *Sony*, 404 U.S. at 455 n.40; *Twin Peaks Productions, Inc.* v. *Publications International, Ltd.*, 1993

U.S. App. LEXIS 13454 *24 (2d Cir. June 7, 1993) ("[T]he second factor, if it favors anything, must favor a creative and fictional work, no matter how successful.")[16] Petitioners and amici, nevertheless, try to stand this proposition on its head, arguing that since parody frequently targets creative works, this factor favors the parodist. *See* Petitioners Br. at 21-22; Capitol Steps Br. at 17; HBO Br. at 16-17.

Petitioners and amici overlook the underlying reasons why creative works are favored. The purpose of the copyright system is to stimulate such creativity by the offer of financial incentives. Care must be taken before allowing fair use of creative works that could reduce such incentives. *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 182 (2d Cir. 1981); *Hi-Tech Video* v. *Capital Cities/ABC*, 804 F. Supp. 950, 955-56 (W.D. Mich. 1992). The need to preserve such strong incentives is particularly pressing in the case of songs: while many songs are written and marketed, very few succeed. (J.A. 323) At the same time, any countervailing societal interest in fair use is weaker because the public interest in broad disclosure of information contained in factual works is not present in the case of creative works. *See Consumers Union of U.S., Inc.* v. *General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984); 2 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A][2] at 102.22 (1992).

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[16] The quoted language also disposes of petitioners' contention that the very success of "Oh, Pretty Woman" should weigh against Acuff-Rose, because the song has already secured "considerable financial benefit" to its owners. *See* Br. at 22, *citing* dictum in *Warner Bros.* v. *American Broadcasting Companies*, 720 F.2d 231, 242-43 (2d Cir. 1983). Nothing could more effectively reduce the incentive of future authors than a rule that the more successful and valuable a work, the less copyright protection it should receive. *See, Bisceglia, supra*, ASCAP Copyright Law Symposium No. 34 at 16-17 (finding such an idea would wreak "havoc" on copyright system).

The "nature of the work" factor favors Acuff-Rose for another reason as well. As the Court noted in *Sony*, 464 U.S. at 455 n.40, copyrights with "broad potential secondary markets ... may well have a broader claim to protection because of the greater potential for commercial harm." A popular song such as "Oh, Pretty Woman" is a work that has a number of potential markets and uses. Songs can be recorded in different styles, to appeal to different audiences. *See e.g. Copyright Law Revision: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong. 2d Sess. 427-30, 439-40 (House Comm. Print 1964) (Statement of Record Industry Association of America) (recognizing that songs regularly appear in various arrangements); *House Committee on the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice Hearings*, 1399-40 (1975) (Testimony of S. Gortikov) (noting that "Bridge Over Troubled Waters" had been recorded in 80 versions and "Yesterday" recorded in 91 versions). They can also be adapted for presentation in a variety of formats other than phonorecords, such as motion picture soundtracks, commercials (J.A. 143-44) and rock videos (J.A. 151). Precisely because of this adaptability, alleged fair uses of songs—including alleged parodies—aimed at audiences other than audiences for "the original version" are more likely to compete with potential uses of the song that might be authorized by the copyright owner, and hence are more likely to interfere with the owner's exploitation of the value of the copyrighted work.

C. 2 Live Crew Copied Excessively From "Oh, Pretty Woman"

1. 2 Live Crew Could Not Take More Than was Reasonably Necessary to Conjure Up "Oh, Pretty Woman"

The third Section 107 factor directs courts to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." While this factor has a quantitative

element,[17] "even more critical than the quantity is the qualitative degree of copying: what degree of the essence of the original has been taken." *Rogers*, 960 F.2d at 311. Thus, in *Harper & Row*, copying only 300 out of 200,000 words in President Ford's memoirs was found to militate against fair use because what was taken was the "heart of the book." 471 U.S. at 565-66, 568.[18]

Courts have recognized that in applying this third factor to a parody some account must be taken of the parodist's need to take enough to "conjure up" the parodied work. *See, e.g., Berlin* v. *E.C. Communications*, 329 F.2d at 545. In order to assure, however, that this qualification does not eliminate the third factor, courts have held that a parody must "take no more from the original than is necessary to accomplish reasonably its parodic purpose." *Fisher* v. *Dees*, 794 F.2d at 439.

We recognize that in some cases this test does not provide a bright-line rule and may require difficult judgments. But such judgments are endemic to copyright law—the determination of infringement itself turns on a test of "substantial similarity" and the distinction between idea and expression. *See Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir.

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[17] *See, e.g., Salinger* v. *Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.) (factor favors copyright holder where one-third of 17 letters and 10% of 42 letters used), *cert. denied*, 484 U.S. 890 (1987); *Marcus* v. *Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983) (wholesale copying precludes application of doctrine); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 756-57 (9th Cir. 1978) (near verbatim copying is not fair use), *cert. denied*, 439 U.S. 1132 (2d Cir. 1979).

[18] *See also Iowa State University* v. *American Broadcasting Companies*, 621 F.2d 57, 61 (2d Cir. 1980) (2.5 minutes out of 28 minute film too substantial); *Hi-Tech Video* v. *Capital Cities/ABC*, 804 F. Supp. 950, 956 (W.D. Mich. 1992) (38 seconds out of 18 minute video substantial); *Roy Export Co. Establishment* v. *Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (55 seconds out of 1 hour and 29-minute film too substantial), *aff'd*, 672 F.2d 1095 (2d Cir. 1982).

1960) ("The test for infringement of a copyright is of necessity vague ... Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*.") (L. Hand, J.). The alternatives to the "necessary to conjure up" test are either to ignore any special needs of parody (which we are not advocating) or to read the "amount and substantiality" factor out of the statute, as some of the amici urge. *See* HBO Br. at 27; PEN American Center Br. at 14. In fact, the courts have inquired into substantiality in virtually all parody cases.[19] They were correct to have done so, because the "necessary to conjure up" analysis provides important guidance about the appropriate fair use treatment of an alleged parody. If an alleged parody takes more than is reasonably necessary to achieve a parodic purpose, it is more likely that the copier's primary goal is exploitation of the economic value of the original. At the same time, the more that is borrowed and the greater its importance to the copyrighted work, the more likely that the "parody" will compete with the

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[19] *See, e.g., Fisher* v. *Dees*, 794 F.2d at 438–39; *Air Pirates*, 581 F.2d at 758; *United Feature Syndicate, Inc.* v. *Koons*, 871 F. Supp. 370, 381 (S.D.N.Y. 1993); *New Line Cinema*, 693 F. Supp. at 1526–27; *Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 353-59 (S.D. Cal. 1955)*. Petitioners and amici prefer to rely on dictum in the Second Circuit's decision in *Elsmere Music, Inc.* v. *National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam) suggesting the "conjure up" standard was not created as a "limit on copying" and that "[e]ven more extensive taking would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." But *Elsmere* has been justly criticized for suggesting "an open-ended standard whereby wholesale appropriation of another's work becomes possible under the banner of fair use provided only the elements of humor are added." Nimmer § 13.05[C] at 13–102.28(16); *see also* W. Patry, *The Fair Use Doctrine in Copyright Law* 165 (1985). The Second Circuit itself has refused to follow the *Elsmere* dictum. *See Rogers* v. *Koons*, 960 F.2d at 311 ("it is not fair use when more of the original is copied than necessary"); *Warner Bros.* v. *American Broadcasting Co.*, 654 F.2d 204, 211 (2d Cir. 1981).

copyrighted work and its potential derivatives. *See* Beth W. Van Hecke, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465, 488 (1992). Thus, as the Second Circuit has warned, an interpretation of the "necessary to conjure up" standard overly favorable to alleged parodies is improper because such a standard "could be used to shield an entire work that is substantially similar to and in competition with the copyrighted work." *Warner Bros.* v. *American Broadcasting Co.*, 654 F.2d 204, 211 (2d Cir. 1981).

2. *2 Live Crew Has Taken Far More of "Oh, Pretty Woman" Than Necessary to Reasonably Accomplish Any Parodic Purpose*

Comparison of the audiotapes of "Oh, Pretty Woman" and "Pretty Woman" lodged with the Court (Complaint, Exs. D & E) show that what was taken here was excessive by any standard.

As previously described, 2 Live Crew's version takes the "heart" of the song and much more. *See* pp. 2, 27, *supra*. It takes far more than was required to "conjure up" "Oh, Pretty Woman" and accomplish *reasonably* 2 Live Crew's alleged parodic purpose. According to Luther Campbell, to conjure up "Oh, Pretty Woman" and successfully create his parody, it was "sufficient" to include the "distinctive introduction of the original version" and "the first line of lyrics." (J.A. 84) Yet Campbell and 2 Live Crew took much more, using the "distinctive introduction" again and again as the driving force of their song and taking other important elements of the music, including the melodic refrain. (J.A. 140) *See* pp. 2, 27, *supra*. Moreover, Campbell also testified that his intention was to parody only the lyrics of the song: "the parody 'Pretty Woman' was an attempt on my part, *through comical lyrics*, to satirize the original work 'Oh, Pretty Woman.'" (J.A. 84) (emphasis added) Yet, the 2 Live Crew version repeats the music of "Oh Pretty Woman" in long instrumental "breaks" in the middle and at the end of the song during which no lyrics are sung and no parody is attempted. This extensive copying of the music cannot be justified as related to any parodic purpose. Its entire

purpose was to exploit, unadorned, the greatness of the original music.

Nonetheless, the district court accepted 2 Live Crew's contention that the taking was not too substantial. While it recognized that "notable aspects of the original song are plainly present," the court found without explanation that there was "relative brevity" of copying. 754 F. Supp. at 1157. It found that repetition of the key riff sounded like a "scratch on a record," 754 F. Supp. at 1155, when the riff is in fact what drives the 2 Live Crew song and gives it life and commercial appeal.

The district court's error is demonstrated by comparison of 2 Live Crew's taking to the much less substantial takings in *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964), and *Fisher* v. *Dees*, 794 F.2d 432 (9th Cir. 1986), the two cases the district court found comparable to this one. *See* 754 F. Supp. at 1157. *Berlin* did not even involve prima facie copyright infringement. *See* 329 F.2d at 545. The case involved lyrical parodies that did not reproduce the songs' music. *See id.* at 542. Unlike here, the parody songs used different titles and virtually no words were identical. *See* 219 F. Supp. 911, 912-913 & n.1 (S.D.N.Y. 1963) (reproducing songs), *aff'd*, 329 F.2d 541.[20] Petitioners and the district court rely heavily on the statement in *Fisher* v. *Dees* that a song is difficult to parody effectively without exact or near-exact copying of the music. *See* Petitioners Br. at 24; 754 F.2d at 1156. Yet, in that case, the parody at issue lasted only 29 seconds and adopted only

[20] Indeed, the taking here is more excessive than the two songs at issue in *Berlin* on which the district court denied summary judgment on fair use, *see Berlin* v. *E.C. Publications, Inc.*, 219 F. Supp. 911, 915 (S.D.N.Y. 1963): the parodies of the songs "Always" and "No Business Like Show Business." The *Berlin* district court found that because these parodies used the same title as the original and their lyrics revolved around the central theme of the original, they took too much (a ruling that was not part of the appeal to the Second Circuit). *See id.* at 914-915.

6 out of 38 bars of the plaintiff's music. *See Fisher*, 794 F.2d at 434. Further, *Fisher* recognized that the musical "parodist's desire to make the best parody must be 'balanced against the rights of the copyright owner in his original expression.'" *Id.* at 439 (citation omitted). It, therefore, emphasized the "brevity" of the taking. *Id.* Taking the signature guitar riff, the melodic line and other key elements of the copyrighted work and making it the entire music of a three-minute recording is not "brevity." The taking at issue here also stands in sharp contrast to that approved in *Elsmere Music, Inc.* v. *National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980), another case relied upon by petitioners, where an 18 second lyrical parody was sung *a capella*, only four notes out of 100 measures of the original song were taken and the only words used were "I Love." *See id.* at 743-744.[21]

The taking in this case went beyond a parodic purpose. It reflects 2 Live Crew's overriding purpose to commercially exploit the appeal of the underlying copyrighted music.

Finally, the amount and importance of the portion of the copyrighted song taken by 2 Live Crew in itself is evidence that the 2 Live Crew recording is likely to compete with the copyrighted song and its potential derivatives. The likelihood of such harm is magnified by the manner in which the 2 Live Crew recording was marketed and the large audience to which it was sold. Hence, the Sixth Circuit correctly concluded that, even if the amount taken by 2 Live Crew were considered no more than necessary to conjure up the original work, it constituted such a

[21] The assertions of Oscar Brand and M. William Krasilovsky, an entertainment lawyer who disclaimed any expertise as a musicologist or music critic, to the effect that the taking was reasonably necessary to the parody (*see* J.A. 32-33, 95) are wholly conclusory and, as we have shown, incorrect. In any event, as the district court recognized, the question of the substantiality of the taking is an ultimate legal conclusion. 754 F. Supp. at 1156, *citing Fisher* v. *Dees*, 794 F.2d at 438 n.4.

substantial portion of the work that the third factor could not favor fair use. 972 F.2d at 1438.

D. 2 Live Crew Failed to Show That Its Commercial Exploitation of the Copyrighted Song Would Not Affect the Potential Market For or Value of "Oh, Pretty Woman"

The fourth factor—the effect of the use upon the potential market for or value of the copyrighted work—"is undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566; *accord Stewart* v. *Abend*, 495 U.S. at 238.

To negate fair use, the copyright holder need not have suffered actual competitive injury. Rather, as the statute itself provides, there must be only "potential" for such injury: "*some* meaningful likelihood of future harm" must exist. *Sony*, 464 U.S. at 451 (emphasis in original). This harm may consist "not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, 471 U.S. at 568. *See* Nimmer § 13.05[A] at 13-102.26 n. 13.1; *Twin Peaks Productions, Inc.* v. *Publications Int'l*, 1993 U.S. App. LEXIS 13454 *26 (2d Cir. June 7, 1993). And in evaluating the potential for injury, courts are to consider not the isolated effect of the defendants' conduct, but whether, if the use "'should become widespread, it would adversely affect the *potential* market.'" *Harper & Row*, 471 U.S. at 568, *quoting Sony*, 464 U.S. at 451 (emphasis in original).[22]

Moreover, this Court stated in *Sony* that: "If the intended use is for commercial gain, that likelihood [of future harm] may be presumed." 464 U.S. at 451. When the reference to "use ... for

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[22] This broad view of potential markets has been applied in parody cases. *See, e.g., Rogers* v. *Koons*, 960 F.2d 301, 312 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 365 (1992); *D.C. Comics* v. *Unlimited Monkey Business*, 598 F. Supp. 110, 118 (N.D. Ga. 1984); *Metro-Goldwyn-Mayer* v. *Showcase Atlanta Co-Op Prod.*, 479 F. Supp. 351, 360-61 (N.D. Ga. 1979).

commercial gain" is understood in light of this Court's explanation in *Harper & Row*, *see* 471 U.S. at 562, the presumption is entirely reasonable. Where the user is exploiting the commercial appeal of the copyrighted work itself, the most logical inference is that the copyright owner also could market the work to the same consumers. That inference is itself evidence of the potential for market harm. Accordingly, the proponent of the fair use affirmative defense must rebut that evidence in order to prevail. II Goldstein, *Copyright* § 10.1.5 at 199 ("If defendant's use is commercial, the defendant continues to bear the burden of proving that the use does not reduce the market for plaintiff's work.").[23]

The existence of a broad market for popular music, the adaptability of music to many genres and tastes, and the very substantial portion of the copyrighted song taken also justify an inference of threatened harm. *See* pp. 27, 30, 33-34, *supra*. In light of this record, the Sixth Circuit's conclusion that there was a presumption of harm was correct. Equally correct was its conclusion that petitioners failed to bear their burden to negate the inferences that gave rise to the presumption.

Petitioners' evidence consists of statements in two affidavits concerning the market appeal of the "Orbison song" and the 2 Live Crew version. The first was an affidavit by Oscar

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[23] Requiring a defendant to produce such evidence is by no means unduly burdensome, as certain of the amici contend. *See* Capitol Steps Br. at 22-23. An alleged infringer, who certainly knows the market for his own work, should face no difficulty assembling evidence to support his defense. Moreover, proof of the market for copyrighted songs should be readily available, through trade publications and other sources. Nor is it unfair that discovery may be required to obtain relevant evidence. *See* Capitol Steps Br. at 23. Parties regularly face the burden of proving elements of a claim or defense with respect to which the opposing party likely has exclusive control of relevant evidence. *See, e.g., Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976) (under section 10b-5 of the 1934 Securities Act, plaintiff must plead and prove defendant's scienter).

Brand, a folk musician and music historian, who offered no qualifications as an expert on either the commercial appeal of "Oh, Pretty Woman," Roy Orbison or the "rap" market. He, nevertheless, opined that the copyrighted song was intended for "Orbison's country music audience and middle-America" while 2 Live Crew's version is "aimed at the large black populace which used to buy what was once called 'race' records" and that 2 Live Crew's "popularity is intense among the disaffected, definitely not the audience for the Orbison song." (J.A. 35) Brand offered no evidence to support his sweeping judgments. The other affidavit was from M. William Krasilovsky, an entertainment lawyer who disclaimed any expertise as a music critic or musicologist and emphasized that he did not intend to give any opinions in those capacities. (J.A. 95) He compared "Oh, Pretty Woman" as "recorded by Roy Orbison" and "Pretty Woman" as "recorded by 2 Live Crew" and concluded that "the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version." (*Id.*) Based entirely on the "widespread publicity and news coverage involving 2 Live Crew" and listening to the recordings, he opines that the "intended audience for the two songs is entirely different." (*Id.*)

The Sixth Circuit concluded that this testimony was "irrelevant" and could not overcome the presumption of harm because it did not address the impact of 2 Live Crew's version on the potential market for derivative works of "Oh, Pretty Woman." 972 F.2d at 1439. The Sixth Circuit was correct.[24/]

[24/] There is no indication that the Sixth Circuit's decision rested on a finding that the market harm arose from the preclusion of Acuff-Rose from the parody market as petitioner and some amici suggest. *See* Petitioners Br. at 35; Capitol Steps *et al.* Br. at 25. It is worth noting, however, that musical parodies are in fact licensed today by songwriters, bringing them significant revenues. (*See* J.A. 325); Casey Del Casino, *The Potential Harm of Musical Parody: Toward an Enlightened Fair Use Calculus*, 6 U. Miami Ent. & Sports L. Rev. 35, 56-57 (1989); Charles J. Sanders and Steven R. Gordon, *Stranger in Parodies: Weird Al and* (continued...)

It is evident that Brand's and Krasilovsky's conclusions about the audience were based solely on a comparison of the Roy Orbison recorded performance of the copyrighted song and the 2 Live Crew recording. They thus confused the copyrighted song with a specific performance of the song. The copyright monopoly, however, gives Acuff-Rose the right to receive revenues under the compulsory license (or negotiated variations thereof) for any variety of performances of the copyrighted song conforming to the "style or manner of interpretation of the performance involved." 17 U.S.C. § 115(a)(2). Moreover, the copyright owner is also granted the exclusive right to derivative works, which would include arrangements that change "the fundamental character" of the music or lyrics of "Oh, Pretty Woman." *See* 17 U.S.C. § 106(2); 17 U.S.C. § 115(a)(2). There are a wide range of such potential derivative uses, including much more than just parodies. For example, in order to compete in the rap market, Acuff-Rose might decide to license a rap adaptation that substantially changes certain aspects of the music or lyrics of "Oh, Pretty Woman" to specifically appeal to rap fans, or it might decide to license use of a fragment of the work in a sound recording.

Through such original and derivative works, Acuff-Rose could market its song in a wide range of markets for a variety of uses. In addition to the Orbison recording, Acuff-Rose has licensed "Oh, Pretty Woman" for use in a popular motion picture (J.A. 143), has entered the market for heavy metal rock songs with the Van Halen version (J.A. 151), and regularly receives requests to license the work in advertisements and promotional campaigns (J.A. 143). Thus, as Acuff-Rose's director of licensing, a veteran of 35 years in the music business, states, the market for "Oh, Pretty Woman" extends beyond the market for the original Roy Orbison recorded performance. (J.A. 144)

[24/](...continued)
the Law of Musical Satire, I Ent., Media & Intell. Property Law Forum 11 at 35-36 (1990).

This potential market includes what petitioners and their experts describe as the audience for 2 Live Crew's "Pretty Woman": a "rap" market purportedly consisting of "young urban blacks" (Petitioners Br. at 34), a group of consumers whose musical tastes are doubtless not confined to parody.

Rap music typically makes use of all styles of music in ways that provide revenues to copyright music owners. Rap groups regularly record "cover" versions of, or "sample" musical riffs from, works of other styles. Note, *A New Spin On Music Sampling: A Case For Fair Pay*, 105 Harv. L. Rev. 726, 726–28 (1992); Alan Light, *About a Salary or Reality?—Rap's Recurrent Conflict*, 90 South Atlantic Quarterly 855, 860–61 (1992) (describing "crossover" works); Catherine I. Powell, *Rap Music: An Education With A Beat From The Street*, 60 J. of Negro Educ. 245, 251 (1991) ("Rap has been successfully meshed with several genres from rock, pop, and house music to jazz and gospel"). While Acuff-Rose could receive royalties from such uses of "Oh, Pretty Woman," any such use would face competition from 2 Live Crew's work, which has already appropriated the "heart of the song" and sold it to the rap market.

The ability of "Oh, Pretty Woman" to compete in the rap market in which 2 Live Crew sells its records is not just potential—it is very real. The record reflects that the rap group Brother Makes 3 created a rap song that "sampled" the whole chorus section or "hook" of the original Roy Orbison recording. (J.A. 326)[25]

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[25] Acuff-Rose refused to authorize the Brother Makes 3 song. However, it is irrelevant whether or not Acuff-Rose has as yet taken advantage of the potential market in which this competition may occur or whether it has any present plans to do so. *See Pacific and Southern Co., Inc.* v. *Duncan*, 744 F.2d 1490, 1996 (11th Cir. 1984) ("copyrights protect owners who immediately market a work no more stringently than owners who delay before entering the market"), *cert. denied*, 471 U.S. 1004 (1985); *Meeropol* v. *Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert.* (continued...)

Brand and Krasilovsky never address these different uses of the copyrighted song, limiting themselves to the Roy Orbison sound recorded performance of the song. Their testimony, therefore, is not responsive to this Court's direction to consider the potential "harm to the market for derivative works." *Harper & Row*, 471 U.S. at 568.

Moreover, petitioners offer no basis for their stereotyped view of the supposed audiences for the Orbison song or the 2 Live Crew version. American popular music knows no ethnic, cultural, class, or even national boundaries. Indeed, one of the great well springs of creativity in American popular music is the cross-fertilization of music from different cultures, to cite the history of jazz and rock and roll as two obvious examples.[26] Elvis Presley, a southern white, revolutionized "white" musical tastes by drawing on sources that originated in African-American

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[25](...continued)
denied, 434 U.S. 1013 (1978); *see also Salinger* v. *Random House, Inc.*, 811 F.2d 90, 99 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). Moreover, there are often sound business reasons for a refusal to grant a license, including a desire to avoid overexposure of a work that would impair its future value and marketability, a belief that the particular version is not the most effective means of entering a particular market and a business strategy that determines certain uses are not the most effective means of marketing a product. *See* J.A. 324–26; Del Casino, *supra*, 6 U. Miami Ent. & Sports L. Rev. at 58.

[26] *See* Leonard Feather, *Encyclopedia of Jazz* 22–23 (1960) ("The music we recognize today as jazz is a synthesis of six main sources: rhythms from West Africa; harmonic structure from European classical music; melodic and harmonic qualities from nineteenth century folk music; religious music; work songs; and minstrel show music."); Anthony DeCurtis and James Henke, *The Rolling Stone Illustrated History of Rock and Roll* 3–15 (3d ed. 1992).

culture.[27] Rap itself has a wide audience among whites as well as blacks. *See* Powell, *supra*, 60 J. of Negro Educ. at 247–48, 253 (describing pop success of black and white rappers); *see also* Light, *supra*, 90 South Atlantic Quarterly at 865. American popular music is a multicultural blend and arguments, such as petitioners', that seek to confine the appeal of songs to one ethnic audience or another are wholly unfounded. Brand and Krasilovsky offer no basis for concluding that the copyrighted song is not adaptable to the tastes of the vast audience for 2 Live Crew and other rap artists.

There is thus ample reason to believe that the mass marketing of the 2 Live Crew version to hundreds of thousands of record buyers, incorporating and emphasizing the heart of "Oh, Pretty Woman," has the potential for inflicting future harm in markets open to the copyright owner.

CONCLUSION

A careful scrutiny of the facts through the lens of the four statutory factors discloses that 2 Live Crew's recording of "Pretty Woman" is not a fair use of the copyrighted Orbison and Dees song, even if it is a parody. Petitioners and amici have misread the presumptions applied by the Sixth Circuit. The presumptions do not render all parodies unfair uses merely because the parodist makes a profit. As applied in cases like this one, the presumptions merely underscore the burden of proving fair use imposed on the authors of a parody that exploits the commercial appeal of the copyrighted material it copies. A case-by-case examination of parodies under the traditional fair use standards is more than

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[27] *See The Oxford Companion to Popular Music* (1991) (entry "Elvis Presley") ("Presley was ... good-looking, moody, and, above all, a white singer with a black sound and a unique feeling for the blues... . The style of Presley's early recordings might be traced back to the two musical cultures of the Mississippi River region: the black slave and work song, culminating in the blues; and the white country style of rapid banjo and guitar picking.").

ample to protect parody and essential to protect copyright owners. In this case, and on these facts, petitioners simply failed to meet their burden to establish fair use.

The order of the Sixth Circuit should be affirmed.

Dated: June 28, 1993

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No. 92-1292

In The

Supreme Court of the United States

October Term, 1993

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

Page

Introduction 1

I. Acuff-Rose Failed to Rebut 2 Live Crew's Proof That Its "Pretty Woman" Would Not Adversely Affect the Potential Market for, or Value, of the Copyrighted Work. 1

II. 2 Live Crew's "Pretty Woman" Was a Parody. It Did Not Take Too Much, and the Nature of Parody Favors a FairUse Finding Under the Four StatutoryFactors. . 3

A. The Purpose and Character of Petitioners' Use of Copyrighted Material from Respondent's Song Was to Create a Legitimate Parody. 3

1. Intent to unfairly exploit the underlying work cannot be presumed from a parody's commercial purpose. 4

2. The record contains no evidence that 2 Live Crew is primarily profiting from the commercial appeal of Respondent's copyrighted song. 6

B. The Nature of the Copyrighted Work Should Be a Neutral Factor in the Context of Parody. 8

C. Analysis of the Amount and Substantiality of the Use Must Recognize the Unique Need of Parody to Incorporate and Transform to Create an Original Work. 8

Contents

Page

D. Petitioners' Parody Has No Effect on the Potential Market for, or Value of, Respondent's Work. 11

III. Legitimate Parody Is a Unique Art Form That Deserves Specific Protection Under the Fair Use Doctrine. 14

A. Recognition of Protection for Parody Furthers the Goals of the Copyright Act. 15

1. Petitioners' parody satisfies even the most narrow definition of "parody." 15

2. Section 115 of the Copyright Act governing compulsory licenses is consistent with fair use protection for commercial parody. 16

B. The Fair Use Doctrine Accommodates Parody's Contribution to the Marketplace of Ideas Protected by the First Amendment. 18

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964) 8, 10, 15, 17

Bloom & Hamlin v. Nixon, 125 F. 997 (C.C.E.D. Pa. 1903) 11

Contents

Page

Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) 8, 9, 10, 15

Celotex Corp. v. Cattrett, 477 U.S 317 (1986) 2, 16

Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440 (N.D. Ill. 1991) 7

Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986).. 7, 8, 9, 10, 11, 13, 14

Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) 9

Green v. Luby, 117 F. 287 (C.C.S.D.N.Y. 1909) 11

Green v. Mitzenheimer, 177 F. 286 (C.C.S.D.N.Y. 1909) . 11

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Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 18

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 18

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Steward v. Abend, 495 U.S. 207 (1990) 1

Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171 (5th Cir. 1980) 8

Contents

	Page
Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 61 U.S.L.W. 2784 (1993 WL 194301), __ F.2d __ (2d Cir. 1993)	5, 9
Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979)	9
Warner Bros., Inc. v. American Broadcasting Cos., Inc., 720 F.2d 231 (2d Cir. 1983)	19

Statutes Cited:

17 U.S.C. § 107	17
17 U.S.C. § 115(a)(2)	16, 17

United States Constitution Cited:

First Amendment	13, 14, 18, 19, 20

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Bisceglia, *Parody and Copyright Protection*, ASCAP Copyright Law Symposium No. 34 at 17 (1987)	14
G. Highet, *The Anatomy of Satire* 110 (1962)	7
Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990)	9
Note, *But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465 (1992)	4, 14

Contents

	Page
Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395 (1984)	14
Webster's New Collegiate Dictionary 62 (1981)	16
H.R. Rep. No. 1476, 94th Cong., 2d Sess. 109, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5724	17

INTRODUCTION

The heart of the Acuff-Rose argument is that 2 Live Crew took too much of "Oh, Pretty Woman" — too much of its music and too much of its market. The Respondent's Brief speaks of "excessive appropriation," "cash[ing] in," "take for themselves profits," "potential for inflicting future harm in markets . . . ." Respondent's Br. pp. 8,9,42. Respondent relies on the *Sony/Harper & Row* presumption that a commercial use is not a fair use, and maintains that the presumption applies unequivocally to parodies. The Respondent argues 2 Live Crew failed to carry its burden of proving their parody did not reduce the overall market for the Orbison-Dees original.

The record does not support the Respondent.

I.

ACUFF-ROSE FAILED TO REBUT 2 LIVE CREW'S PROOF THAT ITS "PRETTY WOMAN" WOULD NOT ADVERSELY AFFECT THE POTENTIAL MARKET FOR, OR VALUE OF, THE COPYRIGHTED WORK.

Effect on the market is, under *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 566 (1985) and *Stewart v. Abend,* 495 U.S. 207, 238 (1990), the "single most important" and "central fair use factor." On that, the parties agree. Respondent's Brief at 36.

Unlike the other fair use factors which may be prone to subjective evaluations, effect upon the market is a matter of fact, not a mixed question of fact and law. The trial court in this case found that fact in favor of 2 Live Crew:

> [W]hile Acuff-Rose is not required to prove damages . . . it has not produced convincing

> evidence that any harm to any existing or potential market has occurred.

J.A. 288.

Indeed, since this case was decided on summary judgment, it comes to this Court with Acuff-Rose having failed to even create a genuine issue of material fact regarding effect on any market for its product. 2 Live Crew presented affidavits to support their fair use defense and summary judgment motion. Those affidavits addressed the effect on the market factor. J.A. 30, 93. Acuff-Rose's burden was to create a disputed issue of fact on that issue.

Acuff-Rose's failure is evident from its Brief. Nowhere in its extended discussion of this central and most important factor does it point to record evidence to support its effect on the market position. Respondent's Br. 36-42. Whatever the value of the *Sony/Harper & Row* presumption in a parody case, *proof* of effect on the market is still the *sine qua non* for a copyright owner seeking to avoid summary judgment when a defendant claiming fair use has adduced evidence of no effect on the market.

The Respondent's approach is to denigrate the Brand and Krasilovsky affidavits, and to offer a number of potential derivative uses which Acuff-Rose "might decide to" tap. Respondent's Br. at 39-40. No evidence or proof supports that conjecture. No evidence or proof supports any finding that if Respondent did "market its song in a wide range of markets for a variety of uses" the 2 Live Crew's song adversely affected any potential market beckoning Acuff-Rose. The Respondent's appellate attack on Brand and Krasilovsky does not meet its trial court burden of at least creating a dispute about effect on the market. Having failed to do so below, Acuff-Rose cannot ask this Court to grant it summary judgment based upon conjectural marketplace theory. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (no genuine issue of fact exists when non-movant fails to

respond to summary judgment with evidence to support its claim).[1]

The Sixth Circuit sought to finesse the evidence by supplanting the unrebutted proof with the presumption of economic harm, citing *Sony* and *Harper & Row*. In the context of parody those cases do not carry the weight assigned them .

II.

2 LIVE CREW'S "PRETTY WOMAN" WAS A PARODY. IT DID NOT TAKE TOO MUCH, AND THE NATURE OF PARODY FAVORS A FAIR USE FINDING UNDER THE FOUR STATUTORY FACTORS.

A. The Purpose and Character of Petitioners' Use of Copyrighted Material from Respondent's Song Was to Create a Legitimate Parody.

The Sixth Circuit suggests a virtually irrebuttable presumption that a "commercial" parody is not a fair use. Respondent attempts to justify this presumption as appropriate when the "user is capitalizing primarily on the commercial appeal of the copyrighted material itself." Respondent's Br. at 22. The

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1. The Respondent demanded that the trial court convert 2 Live Crew's Motion to Dismiss into a Motion for Summary Judgment. J.A. 105. Respondent argued the existence of issues of material facts (J.A. 106-135), but did not support the argument with evidence. The "declarations" of Respondent's musicologist Earl Spielman and Acuff-Rose licensing Director Gerald Teifer did not counter Oscar Brand's affidavit that the parody would only "stimulate interest in the original." J.A. 35. Spielman was silent on market effect. J.A. 142-144. Teifer only speculated: "*If* the 2 Live Crew's derivative work *should become* widespread, it would further impair the value of the copyrighted work, and future opportunities for licensing it." J.A. 144 (emphasis supplied).

If there is a doubt about effect on the market in this parody case, a trial, not presumption or conjecture, should govern the fair use decision.

Sixth Circuit, however, offered no such limitation but concluded simply "that the admittedly commercial nature of the derivative work . . . requires the conclusion that the first factor weighs against a finding of fair use." J.A. 354. Respondent's construction of this presumption, although narrower than the Sixth Circuit's interpretation, nevertheless demonstrates a fundamental misunderstanding of the nature and purpose of parody and has no factual basis in the record.[2]

1. Intent to unfairly exploit the underlying work cannot be presumed from a parody's commercial purpose.

The purpose of parody is to comment or criticize using recognizable material from a popular, *i.e.*, commercially successful, existing work — comment or criticism is not effective if the audience does not know what is being commented on or criticized. A parody also may be commercially successful,[3] and some of that success may derive from the popularity of the underlying work, just as a movie or music review owes part of its audience to the work it critiques. But such commercial appeal of a

2. Respondent contends that Petitioners bear the burden of proof on whether "Pretty Woman" is a fair use of material from "Oh, Pretty Woman." Respondent's Br. at 21. Although styled as an affirmative defense, fair use is also a mixed question of law and fact. *Harper & Row*, 471 U.S. at 561. A fair use proponent's "burden," therefore, is at best uncertain and in the context of parody or other commentary or criticism should be limited to introducing facts sufficient to demonstrate that the copyrighted material was used productively in a legitimate parody. The copyright owner should then be required to demonstrate that the use was nevertheless unfair.

3. Indeed, many artistic classics of literature, including the works of Aristophanes, Chauser, Shakespeare, Alexander Pope, Jonathan Swift and Henry Fielding, were parodies that have been far more successful than the original works parodied. *See, e.g., Note, But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465 n.2 (1992) (discussing such works).

parody may be an inevitable result when a popular work is the target, and that appeal does not make the parody "an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). As the Second Circuit recently observed:

> A copyright holder's protection of its market for derivative works of course cannot enable it to bar publication of works of comment, criticism, or news reporting whose commercial success is enhanced by the wide appeal of the copyrighted work. The [copyright holder] cannot preserve for itself the entire field of publishable works that wish to cash in on the . . . phenomenon [of the original work's popularity].

Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 61 U.S.L.W. 2784, (1993 WL 194301 at *9), __ F.2d __ (2d Cir. 1993).

As a productive use of copyrighted material, a parody adds to the original to create a new work. Some or all of a parody's commercial success may be attributable to the originality of the parodist. The productivity of the use thus may be the source of the parody's commercial appeal, rather than the previous success of the existing work. Many of those who bought the 2 Live Crew album, of which "Pretty Woman" is only a part, undoubtedly did so because they were familiar with the artists, enjoyed the other songs on the album, or liked the humor and critical treatment 2 Live Crew added to the material used from Respondent's song. The critical inquiry thus should be whether the parody makes a productive use of the original. Simply presuming that a "commercial" parody is an unfair use ignores both parody's need to incorporate recognizable material into its comment or criticism and the difficulties of segregating the commercial appeal of the parody's contribution from that of the existing work.

The Respondent, unlike the Sixth Circuit, may argue only that the first factor should weigh against a finding of fair use when the court determines that the *primary* purpose of the use was to exploit the material in the underlying work rather than to incorporate and transform that material into a new and original work of comment or criticism. Such a determination, however, cannot simply be presumed from the commercial nature of the parody but must be supported by a factual record. The record below supports no such determination.

> 2. *The record contains no evidence that 2 Live Crew is primarily profiting from the commercial appeal of Respondent's copyrighted song.*

No evidence in the record supports Respondent's contention that, rather than enjoying a legitimate parody's commercial success, "2 Live Crew is primarily profiting from the commercial appeal of the copyrighted song." Respondent's Br. at 25. Neither the district court nor the Sixth Circuit found that Petitioners' "use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right[s]." *Harper & Row*, 471 U.S. at 562 (emphasis in original). Respondent nevertheless attempts — through innuendo, questionable generalizations from case law, and unsupported assertions — to contest that Petitioners used portions of "Oh, Pretty Woman" as part of a legitimate parody.

Respondent baldly asserts that "Pretty Woman" was marketed as the copyrighted work itself, but the facts do not support that assertion. The credit given to Orbison/Dees and Acuff-Rose on the album is entirely consistent with Petitioners' unsuccessful attempt to secure a license to use portions of the copyrighted work. J.A. 84-87. "Moreover, to consider [Petitioners] blameworthy because [they] asked permission would penalize [them] for this modest show of consideration. Even though such gestures are predictably

futile, [courts] refuse to discourage them." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

Petitioners also should not be precluded from parodying a copyrighted work simply because they are a popular rap group rather than a parody ensemble. Coors Brewing Company, for example, is not a parody ensemble, but its use of portions of Eveready's "Energizer Bunny" advertisements in a commercial parody advertising its beer was a fair use. *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991). Nor should Petitioners be required to specifically identify their work as a parody to be entitled to fair use protection. Literary works frequently incorporate parodies of other works without identifying them as parodies. James Joyce's *Ulysses*, for instance, includes

> a series of parodies covering many types of literature, from the most primitive to what was in Joyce's day fully contemporaneous. The satiric purpose of *Ulysses* (insofar as it is a satire, for the book is many other things as well) is to make mockery of the notion that modern Ireland is a heroic country nourished by noble epic traditions, and to show it as a comical province on the outer fringes of the world of true civilization.

G. Highet, *The Anatomy of Satire* 110 (1962). Indeed, the entire point of parody is to employ humor and the use of recognizable material from popular works so that the audience does not need to be told that it is hearing or seeing a parody or what work is being parodied. Respondent did not offer — nor does the record contain — any evidence that Petitioners intended or their audience believed that "Pretty Woman" was anything but a parody of "Oh, Pretty Woman."

B. The Nature of the Copyrighted Work Should Be a Neutral Factor in the Context of Parody.

Respondent maintains that because "Oh, Pretty Woman" is an original creative work, this factor should weigh against a finding of fair use,[4] but a mechanical application of this fair use factor disregards parody's unique use of copyrighted material. The nature of the copyrighted work should be a neutral factor in determining the applicability of the fair use doctrine to a parody, to the extent it is considered at all. *See Fisher,* 794 F.2d 432 (ignoring this factor in parody fair use analysis); *accord Berlin v. E.C. Publications, Inc.,* 329 F.2d 541 (2d Cir. 1964); *Elsmere Music, Inc. v. National Broadcasting Co.,* 482 F. Supp. 741 (S.D.N.Y.), *aff'd,* 623 F.2d 252 (2d Cir. 1980); *see Triangle Publications v. Knight-Ridder Newspapers,* 626 F.2d 1171, 1176 (5th Cir. 1980) ("the fact that TV Guide is a commercial publication neither supports nor hurts Knight-Ridder's claim that a fair use defense is appropriate" in use of the magazine's cover in comparative advertisement). Works of fact and fiction should be equally subject to commentary or criticism on that work or its themes. That "Oh, Pretty Woman" is a work of fiction or fantasy rather than of fact, therefore, should be irrelevant to whether Petitioners' parody of that work is a fair use.

C. Analysis of the Amount and Substantiality of the Use Must Recognize the Unique Need of Parody to Incorporate and Transform to Create an Original Work.

Regardless of the formulation of the third statutory factor —

4. In addition, Respondent claims that the adaptability of a song to different markets also should be considered under this factor. To the extent this "adaptability" is relevant at all, however, it would impact the effect of the use on the market for or value of the copyrighted work, not the nature of the work. This argument thus is discussed in connection with the fourth statutory fair use factor, *infra* at 11-13.

whether termed as "conjure up,"[5] "reasonably necessary to achieve a parodic purpose,"[6] or "builds upon the original . . . contributing something new for humorous effect or commentary"[7] — the underlying reason for assessing the amount and substantiality of the use of copyrighted material in a parody should be to determine whether the use was productive. A parodist should be able to "'fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism'" or comment. *Harper & Row,* 471 U.S. at 550 (quoting *Folsom v. Marsh,* 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4901)). "[I]f the quoted material is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." Leval, *Toward a Fair Use Standard,* 103 Harv. L. Rev. 1105, 1111 (1990) (identifying parody as an example of such use); *accord Twin Peaks Prods.,* __F.2d at __ (1993 WL 194301 at *6 & *9). Analysis of the "amount and substantiality" factor must include a recognition that the art of parody requires use of identifiable portions of copyrighted material to create new and original works.

Respondent's application of the "amount and substantiality" factor ignores the natural function and structure of parody, despite Respondent's claims to the contrary. "Although the amount taken is a factual issue susceptible of proof, it is a question of law whether the taking is excessive under the circumstances." *Fisher,* 794 F.2d at 438 n.4. As a matter of law, Petitioners made a productive use of the material from

5. *Walt Disney Productions v. Air Pirates,* 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied,* 439 U.S. 1132 (1979).

6. *Fisher,* 794 F.2d at 439.

7. *Elsmere,* 623 F.2d at 253 n.1.

Respondent's song and did not use an excessive amount of copyrighted material in their parody. The guitar riff and the line "Pretty Woman" are the recognizable parts of Respondent's song (J.A. 84) and obviously would be included in any parody of the song — no one would understand the parody if only an obscure bass line or snippet of harmony were used to identify it.[8] Even if these portions represented the "heart" of "Oh, Pretty Woman," using them in the parody only ensured that the audience would readily recognize the work being parodied. *See, e.g., Elsmere Music*, 482 F. Supp. at 744, 747 (musical phrase and lyrics "I Love New York" was "the heart of the composition" but its use "cannot be said to be clearly more than was necessary to 'conjure up' the original").

Nor should 2 Live Crew have been limited to the bare minimum needed to identify Respondent's song. *See Fisher*, 794 F.2d at 438 n.4 (rejecting composers' argument that the parodist could have conjured up the song using only the first five notes and the words "when Sunny gets blue"). The parody includes the meter and some of the music of "Oh, Pretty Woman," but the incorporated elements serve only to contrast the existing work with the parody. *See Berlin*, 329 F.2d at 545 ("the fact that defendants' parodies were written in the same meter as plaintiffs' compositions would seem inevitable if the original was to be recognized").

Like the parodies in *Berlin*, "Pretty Woman" was created primarily by combining new lyrics with the original's meter. As a rap song, "Pretty Woman" incorporated less of the music from Respondent's song than would be used in other styles of musical parody, and it altered much of what was used. For example, Petitioners' parody repeats the distinctive guitar riff to invoke the original, then parodies that riff by altering it. J.A. 32. Such use of

8. Respondent asserts that the guitar "riff is in fact what drives the 2 Live Crew song and gives it life and commercial appeal." Respondent's Br. at 34. Respondent offered no evidence to support this erroneous characterization of Petitioner's parody, and the record is devoid of any such evidence.

music is not a commercial appropriation, but rather is necessary to any parody. *See Fisher*, 794 F.2d at 439 ("[i]f the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience"). The defendant in *Fisher* used 29 seconds of music for a 29 second parody, and he copied the music verbatim, changing only a few of the lyrics. Petitioners used far less than three minutes of the original's music for a three minute parody,[9] altered much of that music, and changed virtually all the lyrics, to comment on and criticize the underlying work. Such a productive use as a matter of law was not excessive.

D. Petitioners' Parody Has No Effect on the Potential Market for, or Value of, Respondent's Work.

As "undoubtedly the single most important element of fair use," *Harper & Row*, 471 U.S. at 566, any presumption of harm to the copyright holder under this factor would eliminate parody that is sufficiently critical that the holder declines to license it. Respondent alleges this presumption is reasonable because "[w]here the user is exploiting the commercial appeal of the copyrighted work itself, the most logical inference is that the copyright owner also could market the work to the same consumers." Respondent's Br. at 37. A legitimate parody, however, is not "exploiting the commercial appeal of the

9. As the court in *Fisher* recognized, musical parody is an art form that requires substantial use of an existing work. 794 F.2d at 439. Indeed, courts have upheld nearly verbatim use of an entire song to parody the recognized performer of that song. *See Green v. Luby*, 177 F. 287 (C.C.S.D.N.Y. 1909); *Green v. Mitzensheimer*, 177 F. 286 (C.C.S.D.N.Y. 1909); *Bloom & Hamlin v. Nixon*, 125 F. 997 (C.C.E.D. Pa. 1903). Petitioners cannot have used an excessive amount of material from Respondent's work when they used less than the optimum amount necessary to create the best parody of "Oh, Pretty Woman." (*See* J.A. 281 & 286 ("2 Live Crew may not have created the best parody of the original," but "the medium is song, its purpose is parody, and the relative brevity of the copying" support fair use).)

copyrighted work itself." *See* discussion, *infra,* at 14. Respondent's analysis of the fourth statutory factor again ignores the fundamental nature of parody and defines the "potential market" for a copyrighted song so expansively that no parody of a musical work could ever be a fair use.

According to Respondent and the Sixth Circuit, injury to Respondent's copyright should be presumed based on the potential effects of the parody on the market for derivative works. One such market identified by Respondent is the licensing of music parodies. The record, however, utterly lacks any evidence that a viable market exists for licensing music parody. Even if some music parodies are produced pursuant to a license, the copyright holder should not be able to censor commentary on or criticism of its work by licensing only those parodies of which it approves.[10] Not only is "[s]elf-esteem . . . seldom strong enough to permit the

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10. Respondent points to the recordings of "Weird Al" Yankovic as examples of music parodies produced pursuant to a license from the copyright holder. (J.A. 325) Unlike Petitioners' parody, however, none of these parodies appear to be critical of the underlying work or recording artist, nor do they comment on any controversial issues, so that the copyright holder would be unlikely to license them. Parody would not long survive as a unique and valuable art form if it were limited to such bland treatment of popular musical works and their themes.

The existence of a fair use defense for parody, moreover, should enhance the market for creating and licensing derivative works that use portions of copyrighted musical compositions. Copyright owners will be more inclined to grant a license when requested if the artist creating the derivative work may be able to claim fair use without such a license. The artist, on the other hand, will be encouraged to seek such a license if any doubt exists about whether the derivative work legitimately comments on or criticizes the copyrighted work or its themes. A freer, more expansive market is a likely result of this equalized bargaining power, in contrast to Respondent's alleged "market" in which copyright owners wield absolute power and the ability to veto creative and productive uses of their works for little or no reason.

granting of permission [for a parody] even in exchange for a reasonable fee," *Fisher,* 794 F.2d at 437, but the copyright holder naturally will seek to protect and enhance commercial demand for its work. "Biting criticism suppresses demand," *id.* at 438, and thus the copyright holder has both a personal and economic incentive to censor such criticism. Respondent, for example, flatly stated that it "cannot permit the use of a parody of "Oh, Pretty Woman"." J.A. 89. Requiring parodies to be licensed by the copyright holder would encourage such censorship and would silence critical voices in the marketplace of ideas guaranteed by the First Amendment.[11]

Respondent also alleges harm to the ability of "Oh, Pretty Woman" to compete in the rap music market, but no basis exists to presume that Petitioners' parody has had any adverse effect on Respondent's ability to license or create a rap version of its song. No evidence in the record supports an inference that a rap *parody* of "Oh, Pretty Woman" will negatively affect the market for a rap *adaptation* of Respondent's song. To the contrary, the record demonstrates that another rap group approached Respondent to license "Oh Pretty Woman" for inclusion in a rap song *after* Petitioners' parody was released. J.A. 326-27. As a matter of fact and law, Petitioners' parody has not adversely affected the potential market for, or value of, Respondent's song.

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11. Indeed, any use of copyrighted material *could* be licensed, including the plot and dialogue from motion pictures or music and lyrics from recorded music for use in television, radio, or newspaper reviews. Such reviews are "blatantly commercial" and criticize the expression rather than solely the ideas in the underlying work, but no court has denied fair use protection to criticism of popular artistic works by recognizing a market for licensed criticism. Such protection arises as a result of sensitivity to First Amendment concerns as much as to copyright's purpose of encouraging artistic creation.

III.

LEGITIMATE PARODY IS A UNIQUE ART FORM THAT DESERVES SPECIFIC PROTECTION UNDER THE FAIR USE DOCTRINE.

" 'Parody by its nature demands close imitation.' " (J.A. 370) (quoting Bisceglia, *Parody and Copyright Protection*, ASCAP Copyright Law Symposium No. 34 at 17 (1987)). " '[P]arodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author.' " *Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986) (quoting Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395, 1411 (1984)). Moreover, "parody can rise to the level of the best literature, at times outliving the works it parodies." Note, *But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465, 465 n.2 (1992). Petitioners urge the Court to recognize that parody's unique nature and social importance require that the fair use doctrine be tailored to ensure proper protection for legitimate parody.

Contrary to Respondent's assertion, Petitioners would not have this Court abandon a case-by-case analysis of fair use or ignore its decision in *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). Petitioners recognize the importance of copyright protection and do not advocate a blanket exemption from the copyright laws for any work that might loosely fit some nebulous definition of "parody." Rather, Petitioners submit that the fair use doctrine is by its very nature flexible and evolving and should be applied to protect and encourage creation of legitimate parodies and to accommodate the First Amendment's interest in fostering an open marketplace of ideas.

A. Recognition of Protection for Parody Furthers the Goals of the Copyright Act.

Respondent mischaracterizes Petitioners' position by claiming that they seek a presumption that any work that can imaginatively be termed a "parody" is automatically entitled to fair use protection. Petitioners advocate no such radical departure from the copyright laws. Rather, Petitioners submit that the statutory fair use factors — at least as interpreted by the Sixth Circuit — are ill-equipped to deal with the need to incorporate material from copyrighted works in the creation of new original parodies. The suggested "presumption" is that *legitimate* parody is entitled to fair use protection, and the statutory fair use factors should be construed in light of parody's unique nature whenever a claimed parody is alleged to infringe a copyright holder's rights. Petitioners thus would have this court "resolve these issues as best [it] can in the light of ill-fitting existing copyright law." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 457 (1984) (Blackmun, J., dissenting).

1. Petitioners' parody satisfies even the most narrow definition of "parody."

As all parties and *amici* have pointed out, no legal definition of "parody" exists. Respondent asks the Court to depart from dictionary and artistic tradition and to define parody as only those works that incorporate some critical comment about the original work. Respondent's Br. at 13. Such a standard, however, would eliminate protection for a vast number of parodies — many of which have previously been protected by other courts — that comment on the themes of the copyrighted work or use that work or its themes to comment on or criticize issues or individuals of public importance. *See Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 746 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (per curiam); HBO Br. at 5-7; Capitol Steps Br. at 15-17.

Petitioners' work, however, satisfies even Respondent's narrow view of parody. The record contains substantial evidence that "Pretty Woman" was intended to and does satirize Respondent's song. J.A. 31-35, 84, 87, 95. Respondent introduced no evidence to the contrary and thus cannot now claim the existence of an issue of fact. *See Celotex*, 477 U.S. at 324. The district court specifically concluded that "Pretty Woman" parodied "Oh, Pretty Woman." J.A. 279-83. The Sixth Circuit majority questioned whether Petitioners' parody targeted the copyrighted work itself but accepted the district court's conclusion that "Pretty Woman" is a parody. J.A. 351. This Court presumed Petitioners' work was a parody when it stated the question presented. As a matter of fact and law, therefore, Petitioners' "Pretty Woman" is a parody.

2. *Section 115 of the Copyright Act governing compulsory licenses is consistent with fair use protection for commercial parody.*

Parodies of musical works are entitled to no less protection than parodies of other copyrighted works. Respondent contends that the compulsory license for musical works mandated in section 115 of the Copyright Act limits fair use protection for parodies of musical works. That section, however, specifically governs "arrangements" of musical works and does not even address musical parodies. 17 U.S.C. § 115(a)(2). An "arrangement" is "an adaptation of a musical composition by rescoring." Webster's New Collegiate Dictionary 62 (1981). A parody is not an adaptation but is a comment or criticism that uses material from an existing work. Section 115, therefore, is irrelevant on its face to analysis of the proper level of protection to which parody is entitled.

Respondent nevertheless claims that Congress intended section 115 to limit parodies of musical works to allow authors to prevent their *works* from being "perverted, distorted, or

travestied." Respondent's Br. at 16 (emphasis added). Congress' concern in section 115, however, was distortion of the work's *music* during rescoring under a compulsory license, not travesties of the musical work as a whole which would not even be eligible for a compulsory license.[12]

Even if Congress was concerned with distortion of copyrighted musical works, not every distortion or travesty of a copyrighted song is a parody. Congress expressly provided for protection of parodies in section 107 and was fully aware of the existence of, and historic protection afforded to, parodies of musical works.[13] Construing the statute as a whole, a legitimate parody that "distorts" or "travesties" a copyrighted musical work or its themes is a fair use under section 107, but a distortion or travesty that does not parody that work or its themes requires a license from the copyright holder under section 115. Section 115 provides no limitation on the protection available for parodies of musical works and, when properly construed in conjunction with

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12. In context, the legislative history provides,

> The second clause of subsection (a) is intended to recognize the practical need for a limited privilege to make *arrangements* of music being used under a compulsory license, but without allowing the *music* to be perverted, distorted, or travestied.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 109, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5724 (emphasis added).

13. Legitimate parody in general and parody of musical works in particular was protected as a fair use long before Congress codified the doctrine in 1976, *see, e.g., Berlin*, 329 F.2d 541 (protecting parody of musical works and decided in 1964), and "[s]ection 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5680.

section 107, demonstrates Congressional recognition of parody as fair use.

B. The Fair Use Doctrine Accommodates Parody's Contribution to the Marketplace of Ideas Protected by the First Amendment.

The freedom to comment on and criticize persons or matters of public interest and concern is a fundamental First Amendment value. Parody exercises that freedom in a uniquely effective way; accordingly, courts have used the First Amendment to protect works of parody. *See, e.g., Hustler Magazine v. Falwell,* 485 U.S. 46 (1988) (First Amendment precluded public figure from recovering damages for emotional distress arising out of parody of him). Respondent would have this Court ignore parody's vital importance to the marketplace of ideas, but fair use must be informed and shaped by the First Amendment.

Respondent relies on the decision in *Harper & Row* for its claim that First Amendment analysis of parody is unnecessary.[14] In that decision, however, the First Amendment issue was whether the public's interest in learning news about matters of public importance as fast as possible outweighed the right of an author to control that news' first publication. Under those circumstances,

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14. Respondent also claims that its property interest in its expression distinguishes this case from First Amendment cases involving libel and flag-burning. Respondent's Br. at 20. Respondent, however, cannot seriously contend that its interest in maximizing economic return on its creativity is more compelling than an individual's reputation and career or the American public's deeply-rooted reverence for its national symbol. Nor does parody represent content regulation of speech or threaten the editorial control and judgment of the press, as was the case in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). Respondent is not being told what to say or publish, only that it cannot prevent others from using material from its copyrighted work to comment on or criticize that work or its themes.

the Court refused "to create what amounts to a public figure exception to copyright" "[i]n view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas." 471 U.S. at 560.

The First Amendment issue in this case, by contrast, is the extent to which a copyright holder can block use of its work to comment on or criticize that work. The concern thus is not who controls the initial release of information, but whether critical speech will occur at all — a far more fundamental First Amendment concern.

Incorporating First Amendment values into the analysis does not "rigidify" fair use but ensures that the doctrine "balances the public interest in the free flow of ideas with the copyright holder's interest in the exclusive use of his work." *Warner Bros., Inc. v. American Broadcasting Cos., Inc.,* 720 F.2d 231, 242 (2d Cir. 1983). The First Amendment interest in fostering commentary on and criticism of popular artistic works and matters of public concern must weigh heavily in the balance when assessing the proper level of protection for parody.

CONCLUSION

Congress never intended the copyright laws to be used to stifle all commercially successful comment on or criticism of protected works or their themes. The approach advocated by Respondent and its *amici,* however, would have just such an effect. Petitioners and many of their *amici,* like Respondent and its *amici,* have a vested interest in copyright and do not advocate wholesale abandonment of that protection for musical works. Nor do they seek to eliminate the fair use doctrine in the name of protection for any work that can remotely be termed a "parody." Rather, Petitioners seek the freedom to comment on and criticize

copyrighted works and their themes through creative, original works of parody without having to tailor that comment or criticism to the personal sensitivities of the copyright holder. Copyright law and the First Amendment demand no less.

Petitioners' parody is a fair use of Respondent's song. Accordingly, the Sixth Circuit's decision should be reversed, and the district court's ruling should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1992

LUTHER R. CAMPBELL A/K/A LUKE SKYYWALKER, CHRISTOPHER WONGWON A/K/A FRESH KID ICE, MARK ROSS A/K/A BROTHER MARQUIS, DAVID HOBBS A/K/A MR. MIXX; PROFESSIONALLY KNOWN AS THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of *Amici Curiae* Concerned Law Professors Robert C. Berry, Ralph S. Brown, Amy B. Cohen, Dean M. Hashimoto, Peter Jaszi, Beryl R. Jones, David Lange, L. Ray Patterson, Pamela Samuelson, David J. Seipp and Alfred C. Yen in Support of Petitioners

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Brief of *Amici Curiae* 1

Statement of Interest 2

Summary of Argument 4

Argument 5

I. The Sixth Circuit's application of the fair use doctrine is inconsistent with basic copyright policy and the public interest 5

A. The Sixth Circuit's presumption against the fair use treatment of commercial uses is inconsistent with the copyright code, the relevant legislative history, and past precedent established by this Court 5

B. Commercial parodies are excellent candidates for fair use treatment 9

C. The Sixth Circuit should have found petitioners' commercial parody to be a fair use 14

II. The First Amendment requires a reversal of the decision below 18

A. This Court should recognize clear First Amendment limits to the reach of copyright law.....18

B. The Sixth Circuit's decision violates the First Amendment because it permits the censorship of unpleasant criticism.....23

Conclusion.....27

TABLE OF AUTHORITIES

Cases

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Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984).....4, 25, 26

Cohen v. California, 403 U.S. 15 (1971).....24

Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184 (5th Cir. 1979).....19

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New Era Publications International, ApS, v. Henry Holt and Company, Inc., 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) 19, 21-22

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R.A.V. v. City of St. Paul, 60 U.S.L.W. 4667 (1992) 24

Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 890 (1967) 8

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Schact v. United States, 398 U.S. 58 (1970) 24, 25, 26

Schnapper v. Foley, 471 F. Supp. 426 (D.D.C. 1979), *aff'd*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) 19-20

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 7

Street v. New York, 394 U.S. 576 (1969) 24

Texas v. Johnson, 491 U.S. 397 (1989) 24, 26

Tinker v. Des Moines School District, 393 U.S. 503 (1969) 24

Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) 19

Constitutional Provisions

United States Constitution, art. I 18

United States Constitution, amend. I 18-28

Statutes and Legislative History

17 U.S.C.A. §107 (1992), *amended by* PL-102-492 (1992) 5-8

H.R. Rep. 94-1476, 2d Sess., *reprinted at* 1976 U.S. Code Cong. & Admin. News 5659 8

Rules

Supreme Court Rule 37.3 3

Scholarly Articles and Books

Bezanson, Soloski & Cranberg, *Libel Law and the Press* (1987) 11

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Newspaper Articles

New York Times, May 18, 1991, Section 1, page 46 2

No. 92-1292

In the

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a/ MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS, *Petitioners*,

vs.

ACUFF-ROSE MUSIC, INC., *Respondent*.

On writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Brief of *Amici Curiae* Concerned Law Professors Robert C. Berry, Ralph S. Brown, Amy B. Cohen, Dean M. Hashimoto, Peter Jaszi, Beryl R. Jones, David Lange, L. Ray Patterson, Pamela Samuelson, David J. Seipp and Alfred C. Yen in Support of Petitioners

STATEMENT OF INTEREST

Amici curiae, an *ad hoc* association of law professors,[1] have an interest in this case as citizens of the United States of America and scholars who actively study and teach the law of copyright. As citizens, we watch with concern as growing numbers of copyright owners use copyright to suppress opinions or artistic expression which they find distasteful.[2] Although these suits are not uniformly successful, their occasional success leaves a palpable chill upon others interested in similar forms of expression. The risk and expense of being sued, let alone the danger of an unfavorable judgment, forces potential authors into the unenviable choice of expressing themselves in a way which appeases the copyright holder or not expressing themselves at all. In either case, the public suffers serious harm, for neither censored nor unpublished expression serves a robust free marketplace of ideas so essential to the

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[1] All *amici* are either full time law professors or professors *emeriti*. Their academic affiliations are listed at the end of this brief. These affiliations are provided for the Court's information only. *Amici* file this brief in their capacity as individuals, and not as legal representatives of their respective law schools.

[2] A prominent recent example of this phenomenon is the dispute between Sut Jhally, a professor of communications at the University of Massachusetts, and the cable television network MTV. Professor Jhally made a video entitled "Dreamworlds: Desire/Sex/Power in Rock Video." The video analyzed 165 clips from music videos to conclude that women are generally portrayed as sex objects or nymphomaniacs. Professor Jhally then offered the video for sale, with all proceeds going to a university trust fund which benefitted the communications department. MTV was not amused and threatened Jhally with a copyright suit. *A Professor's Class Video Runs Into an MTV Protest*, New York Times, May 18, 1991, §1, at 46.

health of our society. Of course, potential authors lose as well, for the existence of private censorship implies a loss of precious individual rights of free speech.

As legal scholars, *amici* are particularly familiar with the peculiar interpretation of copyright law which makes the foregoing suppression of speech possible. This interpretation begins with a failure to heed the basic policies behind copyright law and the First Amendment, and it leads some courts to apply a wooden, remorseless presumption against commercial fair uses. With all due respect to those courts, it is fair to state that this presumption has become one of the most troubling developments in modern copyright law, for it wrongly chills the creation of many valuable works such as biographies, social commentary, and news reports. All of these extremely important works are generally created for commercial purposes. Yet, under the presumption, their existence often depends on the approval of some other person - a copyright holder. In our view, these works are far too important to have their continued viability depend on that approval. *Amici* have therefore filed this brief to point out undesirable ramifications of the presumption against fair commercial uses, especially in the case of parody.[3] It is our sincere hope that the Court will find our analysis helpful.

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[3] *Amici* have received written permission from both parties to file this brief under rule 37.3 of the Rules of the United States Supreme Court. The original letters of permission are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision is based on an improperly rigid presumption against the fair use treatment of any commercial use. Although the commercial nature of a use is important in any fair use analysis, the universal presumption applied by the Sixth Circuit seriously impairs copyright's ability to promote socially valuable expression. In the context of parody, copyright holders generally have no interest in selling rights to parodists nor exploiting the market for parodies themselves. Indeed, copyright holders often have the desire to suppress the production of parodies. When this happens, copyright holders receive no financial incentives for future creation, and potential parodists find themselves unable to get material essential to their expression. The public loses a valuable art form, and copyright fails in its mission to encourage creative expression. *Amici* therefore urge the Court to strike down the rigid application of the presumption against fair commercial uses, especially in the context of parody, by reversing the decision below.

Additionally, the First Amendment to the United States Constitution provides a separate basis for reversal of the decision below. In this case, the Respondent is using copyright to censor a critical opinion it finds offensive. Similar efforts have long been abhorred by this Court in areas such as libel, product disparagement and intentional infliction of emotional distress. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1975); *Bose Corp. v. Consumers Union of U. S., Inc.*, 466 U.S. 485 (1984); *Hustler*

Magazine v. Falwell, 485 U.S. 46 (1988). In those cases, the Court has responded to the challenge of censorship in two ways. First, the Court has consistently found the public's interest in a robust free marketplace of ideas superior to the state's interest in protecting individuals from expression they find distasteful. Second, the Court has protected individuals whose expression may be chilled by the possibility of censorship by extending First Amendment protection to some persons whose speech does not serve the free marketplace of ideas. This protection sends a clear signal that our government guarantees the free exercise of First Amendment rights to all those whose speech arguably serves the free marketplace of ideas, thereby reducing the chill created by the possibility of censorship. *Amici* firmly believe that the same result should be reached in this case.

ARGUMENT

I. THE SIXTH CIRCUIT'S APPLICATION OF THE FAIR USE DOCTRINE IS INCONSISTENT WITH BASIC COPYRIGHT POLICY AND THE PUBLIC INTEREST.

A. The Sixth Circuit's presumption against the fair use treatment of commercial uses is inconsistent with the copyright code, the relevant legislative history, and past precedent established by this Court.

As a matter of copyright law, the outcome of this case is controlled by the fair use doctrine, which has been codified as section 107 of the copyright code.

17 U.S.C.A. §107 (1992), *amended by* PL-102-492 (1992). Section 107 requires the Court to consider four factors in resolving questions of fair use.[4] With respect to these instructions, both the Sixth Circuit and the Middle District of Tennessee considered all four factors. The Sixth Circuit's reversal of the district court, however, rests primarily on a difference over how to apply the first and fourth factors to the facts of this case.[5]

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[4]Section 107 states in pertinent part:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

[5]As to the second factor, both courts correctly concluded that the nature of the copyrighted work suggested a finding against fair use. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1155-56 (M.D. Tenn. 1991); *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437 (6th Cir. 1992). As to the third factor, the Middle District of Tennessee found that it clearly signalled a finding of fair use, while the Sixth Circuit concluded that it was neutral as to fair use. 754 F. Supp. 1156-1157; 972 F.2d 1437-38. While *amici* disagree with the Sixth Circuit's conclusion on the third factor, we have decided not to address it in this brief for three reasons. First, we do not believe that Sixth Circuit's error in interpreting the third factor played a major factor in its decision to reverse the District Court. Second, we believe that cases such as *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) and *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) have clearly settled the proper interpretation of that factor. Third, we believe Judge Wiseman's opinion for the Middle District of Tennessee already draws this Court's attention to the proper analysis for the instant case. Accordingly, *amici* shall concentrate on the construction of the first and fourth factors of the fair use analysis.

According to the Sixth Circuit, the commercial nature of Petitioners' parody creates a practically conclusive presumption against fair use. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3667 (1993) ("Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair."); 972 F.2d 1438 ("In the instant case, the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists.").

The source of the Sixth Circuit's presumption is clear. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), this Court wrote - albeit in dicta - that "every commercial use of copyrighted material is presumptively an unfair exploitation [of copyrighted material]." 464 U.S. 417, 451 (1984). Taken literally, this statement does support the Sixth Circuit's analysis. However, this analysis cannot possibly be correct.

First, many commercial uses are obviously fair. Criticism, comment and news reports are often sold to their readers, yet section 107 of the copyright code lists them as likely examples of fair use. 17 U.S.C.A. §107 (1992). Biographers and historians certainly write for profit. Nevertheless, it is still a fair

use when they quote or paraphrase from published writings about their subjects. *See Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 890 (1967); *New Era Publications International, ApS, v. Carol Publishing Group*, 904 F.2d 152 (2d Cir. 1990), *cert. denied*, 498 U.S. 921 (1990). If the Sixth Circuit's analysis were to be adopted by this Court, all of these uses would become presumptively unfair.

Second, Congress has clearly stated that while commercial use affects any fair use analysis, it is simply one of many factors which are important. Section 107 of the copyright code provides that courts should consider "the purpose and character of the use, *including* whether such use is of a commercial nature..." 17 U.S.C.A. §107(1) (1992) (emphasis added); *see also* H.R. Rep. 94-1476, 2d Sess. 66, *reprinted in* U.S. Code Cong. & Admin. News, 5659, 5679 ("the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions").

Finally, although this Court has quoted the *Sony* dictum with approval, it has been careful to avoid the very analysis endorsed by the Sixth Circuit. For example, in *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985), the Court examined a news report which quoted several passages from Gerald Ford's as yet unpublished memoirs. The *Harper & Row* Court could have denied fair use treatment simply because the defendant quoted the plaintiff's work for commercial purposes. However, the Court also considered the fact that the defendant's use was a news report, the defendants'

attempt to "scoop" its competition, and the peculiar timing of the defendants' publication. In doing so, the Court stated that the commercial nature of a use is "a *separate* factor that *tends* to weigh against a finding of fair use." 471 U.S. at 562 (emphasis added).

B. Commercial parodies are excellent candidates for fair use treatment.

The foregoing shows that a denial of fair use cannot begin with a blunt presumption against fair commercial use. Instead, a defendant's commercial purpose must be considered along with other factors such as the character of his use. Sometimes this character establishes that a denial of fair use cannot serve copyright policy. When this happens, a court should lean towards a finding of fair use despite a defendant's commercial motives. Commercial parodies exemplify this phenomenon.

The analysis supporting this assertion starts with the policy behind the fair use doctrine.[6] Copyright encourages creative activity for the benefit of the public by giving authors a fair return on their labor. Of course, the granting of these benefits is not without its costs, for new authors must borrow from existing materials to create new works. If copyright outlawed all borrowing, the creative process would surely grind to a halt, thereby depriving the public of the very benefits copyright should secure. Copyright therefore limits the extent to which copyright holders can prevent others from using copyrighted works. The fair use doctrine is one of the provisions which

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[6]For a fuller discussion of the issues presented here, see Yen, *When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law*, 62 U. Colo. L. Rev. 79 (1991).

accomplishes this task. It does so by considering whether the free use of copyrighted material would serve the public better than the usual maintenance of an author's copyright rights.

To see how the commercial purpose of a use sometimes tips this analysis against fair use, consider the commercial production of movies from books. In this scenario, the commercial nature of the use suggests that the movie producer will have ample funds which could be offered to a copyright holder. Additionally, the copyright holder will probably be anxious to sell these rights at a fair price, for the copyright holder will enjoy both the money and the favorable publicity which the movie will create. Indeed, the copyright holder will almost certainly cooperate with the movie maker to ensure production of the best movie possible. These observations suggest that a denial of fair use would be appropriate for three reasons.

First, a denial of fair use forces the movie maker to offer money to the copyright holder for the necessary rights. The public benefits from the increased creativity stimulated by this financial reward. Second, the author's willingness to sell means that the proposed movie will probably be made. Denial of fair use therefore will not cost the public the benefits of the proposed use. Third, the author's self interest motivates him to serve the public interest by ensuring production of a good movie.

For purposes of contrast, consider next a very different commercial use - a critical, unflattering book review which reproduces a portion of the

copyrighted text under review. Initially, it might appear that the commercial nature of the review would again cut against fair use, for commercial book reviewers do raise money which could be offered to copyright holders. Copyright holders, however, will not deal with unflattering book reviewers in the same manner as movie producers.

As noted earlier, copyright holders are generally pleased to sell movie rights. By comparison, copyright holders are much less likely to sell the necessary rights to critical reviewers. Although the sale of these rights would raise money, the copyright holder will likely refuse the money because the review, unlike the movie, will create negative publicity. Since authors (like most people) value their reputation more than money, they would simply prefer to forego money in exchange for the comfort of knowing that no one will criticize them or their work.[7]

The hostile book review scenario provides an excellent example of a case in which the character of a proposed use is more important than its commercial nature. Here, the unflattering character of the proposed use keeps the copyright holder from selling the necessary rights. Accordingly, the denial of fair use rights to hostile book reviewers fails to serve - and even harms - the public interest. First, the copyright holder's refusal to sell means that he will

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[7] Empirical evidence of this proposition is provided by Professors Bezanson, Soloski & Cranberg in their book *Libel Law and the Press* (1987). In that work, they present survey evidence in which individuals whose reputation has been damaged by libel stated that they did not consider money an adequate remedy for their losses.

realize no financial revenue. Thus, the public will gain nothing in the increased production of new works. Second, the reviewer's inability to buy the necessary rights means that the public will also be deprived of the reviewer's views. Third, if an author were for some reason inclined to sell rights to a hostile reviewer, he would not likely sell those rights unconditionally. Instead, the author would probably condition the sale on some curtailment of reviewer's criticism. In short, the author's self interest leads him to hamper, and not assist, the proposed use.

The foregoing creates an analysis which determines whether commercial parodies are good candidates for fair use treatment. If copyright holders are anxious to sell the necessary rights to parodists, the analysis tips against fair use because a denial protects the financial incentives provided by copyright. However, if copyright holders are not anxious to sell because they fear criticism or negative publicity, the analysis should tip in favor of fair use. When one considers the particular character of commercial parody, an inclination towards fair use becomes clear.

As both the district court and the Sixth Circuit note, parody is an art form which mimics an existing work for a specific purpose - the humorous criticism and ridicule of society and the parodied work. 754 F. Supp. 1154 n.2; 952 F.2d 1435-36 n.8. Although humor and criticism are expressed in ways other than parody, parody is a particularly valuable method of expressing these views because parody's unique combination of criticism and humor creates a

pungent expression of opinion which the public is likely to remember for a long time.[8]

Parody's unique and powerful brand of criticism plays an important role in deciding whether to favor the fair use treatment of commercial parodies. If these works are denied fair use treatment, parodists, like movie producers, will try to buy the necessary rights from copyright holders. However, unlike movie producers, parodists will not generally be successful.

As noted earlier, the author whose book is adapted for a movie gains both money and favorable publicity. Authors therefore are happy to sell movie rights, and they cooperate in creating the best movie possible. By contrast, since parodies subject existing works to criticism, copyright holders have little interest in having others (or themselves) parody their work. *See Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) ("Self esteem is seldom strong enough to permit the granting of permission [to a parodist] even in exchange for a reasonable fee."). Furthermore, if parody rights ever were sold, the authors in question will try to sell them only to the "worst" parodists -

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[8]The long and venerated history of parody demonstrates its value. Authors such as Aristophanes, Chaucer, Shakespeare, Swift, Pope, Fielding, Twain and Thurber all wrote important works which are parodies. For discussions about parody as an art form, see *Parodies: An Anthology from Chaucer to Beerbohm-and After* 557-69 (D. Macdonald ed. 1960), and Goetsch, *Parody as Free Speech-The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3. W. New. Eng. L. Rev. 39, 39-42 (1980).

those whose critical bite is either nonexistent or ineffective.[9]

These observations demonstrate that commercial parodies are excellent candidates for fair use treatment. Without fair use treatment for parodies, the public interest will be severely harmed. First, the public will gain nothing in future production from copyright holders, because their refusal to sell parody rights means they are not reaping the financial incentives provided by copyright. Second, very few parodies will be made, and the public will lose a valuable art form. Third, copyright holders will try to ensure that the parodies which are made will be of inferior quality.

C. The Sixth Circuit should have found Petitioners' commercial parody to be a fair use.

The importance of fair use treatment for commercial parodies sets the stage for determining the proper outcome of this case. As to the first factor of the fair use test, resolution in favor of Petitioners now depends on whether the Petitioners' particular work fits within the definition of parody as a humorous and critical form of art. The Petitioners' work clearly meets this test.

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[9]Perhaps the best expression of this sentiment is the statement by the attorney for the copyright holder in *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court sub. nom. Columbia Broadcasting Sys. v. Loew's , Inc.*, 356 U.S. 43 (1958), an early parody/fair use case: "[W]e are not against laughter - at least so long as the laugh is not at our expense." reported in Schooner, *Obscene Parody*, J. Arts Mgmt. & L., Fall 1984, at 91 n. 158.

First, Petitioners have substituted their humorous lyrics for those of the original. Second, Petitioners have substituted their irreverent, somewhat shocking rap style for the familiar, carefree style of the original. Third, Petitioners have combined a series of increasingly unflattering images with a humorous, progressive distortion of the Respondent's song. Together, these techniques create a genuine parody in which the "pretty woman" becomes foolish and then repulsive.[10] The Petitioners' message is quite clear. For them, the original song "Oh, Pretty Woman" is not the expression of healthy, innocent longing. Instead, the song represents an experience which is banal, laughable, and even disgusting.[11] Surely this is humorous criticism of the most unflattering sort.[12]

With respect to the second factor of the fair use test, *amici* agree with the Sixth Circuit's conclusion that the second factor weighs in favor of Respondent.

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[10]The woman in the Petitioners' song is first "pretty," then "hairy," then a prostitute, and finally pregnant by the singer's friend.

[11]*Amici* note that the district court's analysis and conclusion are essentially the same as that presented here. 1150 F. Supp. 1155 ("[petitioners'] song derisively demonstrates how bland and banal the Orbison song seems to them."). Furthermore, the Sixth Circuit accepted the district court's conclusion that the Petitioners' use was a valid parody, albeit reluctantly. 754 F.2d 1435.

[12]Respondent may claim that Petitioners' parody cannot be characterized as such because it criticizes society, and not the Respondent's work. The implausibility of such an argument is demonstrated by the Respondent's claim that the Petitioners' work "disparaged" and "sullied" the Respondent's work. Plaintiff's Complaint, Appendix C to Petition for Certiorari 60a-61a; 754 F. Supp. 1155 n. 4. If this argument is true, then Petitioners' work must be critical of Respondent's work.

As to the third factor, *amici* accept for purposes of argument the Sixth Circuit's conclusion that this factor is neutral.[13]

Finally, *amici* believe that the fourth factor of the fair use test tilts strongly in favor of Petitioners. As this brief has shown, derivative works such as movies from books and parodies negatively affect the market for and value of the original in two different ways. First, the derivative works may represent uses the author wants to exploit himself. In this situation, it can make sense to resolve the fourth factor against fair use in order to protect the monetary incentives copyright rightly gives to the author. Second, the derivative work may negatively affect the value of the work by ridiculing or criticizing it. In this situation, it does not make sense to resolve the fourth factor against fair use because protecting authors from criticism will not make them more creative, and it will certainly cost the public valuable critical opinions.[14]

When one studies the opinion below, it is quite clear that the Sixth Circuit assumed that this case is one in which the Respondent copyright holder has a genuine interest in exploiting the market for parodies. Indeed, the Sixth Circuit analogized this case to the making of movies from books. 972 F.2d

[13]Although we consider the district court's analysis of this factor superior to the Sixth Circuit's, we believe that there is no need to reargue the points made by the district court, as those points are already before this Court.

[14]In one of the classic works on copyright law, Benjamin Kaplan expressed this outcome in following manner: "[W]e must accept the harsh truth that parody may quite legitimately aim at garroting the original." B. Kaplan, *An Unhurried View of Copyright* at 69 (1967).

1429 ("[A] movie adaptation is made of a book. Even though the movie may boost book sales, it is an unfair use because of the effect on the potential sale of adaptation rights."). However, careful examination of the facts reveals the grave error of this assumption, for it is abundantly clear that Respondents have absolutely no interest in exploiting the market for parodies and are trying to use copyright to prevent the Petitioners from ridiculing their work.

The most telling evidence of this is the fact that Petitioners actually asked the Respondent for permission to parody the Respondent's song. If the Respondent had been interested in exploiting the market for parodies, one would expect the Respondent to negotiate over the price to be charged for permission. Of course, Respondent did no such thing. Instead of showing interest in a use it hoped to exploit, Respondent simply denied permission for parody outright and filed a lawsuit in which it argued that the Petitioners' work "disparage[d]" and "dirtied" the song's copyright. Plaintiff's Complaint, Appendix C to Petition for Certiorari 60a-61a; 754 F. Supp. 1155 n. 4. This is exactly what one would expect from an indignant copyright holder who is interested not in exploiting copyright rights, but in using copyright to protect itself and its work from legitimate criticism.[15]

[15]Respondent may contend that a copyright holder's ability to guard against a critical parody preserves the value of its work, and that this is a legitimate use of copyright. This position is absurd. First, authors have always published under the risk that they and their work might be criticized. To claim that copyright - or any other law - allows authors to sue their critics is to claim that those who write get to control what others say about them. Indeed, if Respondent's claim is true, then authors should be

The foregoing discussion reveals that the four fair use factors come out in the following pattern. Two factors, the first and the fourth, weigh in favor of the Petitioners. One factor, the second, weighs in favor of the Respondent. One factor, the third, is neutral. When one also considers the fact that the fourth factor, "undoubtedly the single most important element of fair use,"[16] weighs strongly in Petitioners' favor, the only conclusion that can be reached is one granting fair use protection to the Petitioners' parody. For this reason, the Sixth Circuit's decision below should be reversed.

II. THE FIRST AMENDMENT REQUIRES A REVERSAL OF THE DECISION BELOW.

A. This Court should recognize clear First Amendment limits to the reach of copyright law.

First Amendment issues are implicit in every copyright case. As an initial matter, Article I of the Constitution authorizes the passage of copyright legislation, and the First Amendment limits the powers granted by Article I. Additionally, copyright is the legal descendant of censorship,[17] something the First Amendment abhors. Finally, the creation of new works necessarily requires some borrowing from

able to sue critical book reviewers. Second, the First Amendment prohibits the censorship that this position implies. *Amici* address this point further in part IIB of this argument.

[16]*Harper & Row*, 471 U.S. at 566.

[17]See Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L. J. 517, 524-25 (1990).

existing ones. Copyright's prohibition against borrowing therefore implies some restriction on free speech.[18]

Despite these observations, however, courts uniformly reject First Amendment defenses to copyright claims.[19] Although copyright does prevent some people from expressing themselves as they please, copyright encourages others to express themselves through its financial incentives. Also, to the extent that copyright's prohibition against borrowing becomes too burdensome, doctrines like the idea/expression dichotomy and fair use act as safety valves, thereby ensuring copyright's ability to encourage more speech than it restricts. Indeed, some courts have gone so far as to assert that the First Amendment is irrelevant to copyright law.[20]

[18]For three recent articles discussing the conflict between copyright and the First Amendment, see Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 Wm. & Mary L. Rev. 665 (1992); Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 Emory L. J. 393 (1989); Patterson, *Free Speech, Copyright and Fair Use*, 40 Vand. L. Rev. 1 (1987).

[19]*See, e.g., McGraw-Hill v. Worth Publishers, Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y. 1971) ("Defendants First Amendment argument can be dismissed as flying in the face of established law."); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) ("defendant's [First Amendment] claim can be dismissed without a lengthy discussion..."); *Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187-88 (5th Cir. 1979)

[20]Examples of this include *New Era Publications Intern. v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) ("the fair use doctrine encompasses all claims of first amendment in the copyright field...") and *Schnapper v. Foley*, 471 F. Supp. 426, 428 (D.D.C. 1979), *aff'd*, 667 F.2d 102 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) ("[I]t is

This extreme position is gravely mistaken. Even if copyright encourages more expression than it restricts, it does not necessarily follow that all plausible constructions of copyright law are consistent with the First Amendment. This is because courts have not limited copyright to the protection of financial opportunities that copyright holders would like to exploit. Instead, courts have suggested that copyright holders may sue to protect their privacy, reputation or sensibilities.[21] This in turn has led to cases in which plaintiffs use copyright simply to suppress the expression of views they find distasteful or offensive.[22] All of these cases raise serious First Amendment issues which require special attention.

First, copyright no longer encourages more speech than it restricts when a plaintiff uses copyright to protect his privacy, reputation or sensibilities. This is because such interests are at best remotely connected to the monetary rewards by which copyright encourages expression. Protecting these interests would therefore create measurable First

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well established that there is no conflict between the First Amendment and the copyright laws.").

[21]*See Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S, 890 (1987); *MCA v. Wilson*, 677 F.2d 180 (2d Cir. 1981) (apparently basing decision against defendant in part on "dirty" lyrics of defendant's song entitled "Cunnilingus Champion of Company C").

[22]See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986) (plaintiff sued in copyright to interfere with political fundraising of enemy); *Maxtone-Graham v. Burtchaell*, 631 F. Supp. 1432 (S.D.N.Y. 1986), *aff'd*, 803 F.2d 1532 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987) (plaintiff, a pro-choice author, sued defendant in copyright because defendant's essay did not promote pro-choice views). See also footnote 2, *supra*.

Amendment losses without stimulating any new expression.

Second, and perhaps more important, the quality of expression will suffer as well. Many important forms of speech are recognizably derivative, and as such their vitality could depend on the consent of a copyright holder. Historians, news reporters and biographers refer to and quote from copyrightable sources. Lecturers and political parties often use copyrighted statements to illustrate their points. Each of these expressions plays a vital role in the intellectual and political traditions which the First Amendment protects. These roles would be severely compromised if the people who author these expressions could be prevented from speaking by a copyright holder who found their views distasteful. If copyright could ever be used to protect a claimant's reputation, privacy or sensibilities, the mere expense of being sued - let alone the possibility of adverse judgment - would encourage many to submit their writings to copyright holders for approval. We would wind up with a discourse in which those who happen to own copyrights control what is said by others.[23]

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[23]This concern is not a matter of idle theory. Consider the problems raised by two recent cases against biographers who are critical of L. Ron Hubbard and the Church of Scientology. In these cases, the holder of copyrights bequeathed by Hubbard to the Church of Scientology sued for injunctions against publishers of biographies which used Hubbard's copyrighted writings to make unflattering points about Hubbard and the church. Ordinarily, one might think that biographers would have broad license to make use of these materials. After all, direct quotation from original sources is one of the most accurate means of establishing certain facts. The courts, however, did not interpret the law that way.

The foregoing discussion shows that copyright does raise First Amendment issues which cannot be eliminated by the platitude that copyright encourages more speech than it eliminates. Furthermore, copyright threatens the quality of discourse by encouraging speakers to submit to censorship. Accordingly, courts should not take the view that the First Amendment may be ignored in copyright cases. *Amici* urge this Court to eliminate this dangerous practice with a clear statement of the First Amendment's relevance to copyright law.

In the first case, *New Era Publications International, ApS, v. Henry Holt and Company, Inc.*, 695 F. Supp. 1493 (1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), the district judge denied injunctive relief on two grounds. First, most of the biography's quotations were fair uses. Second, the First Amendment prohibited enjoining the dissemination of speech. 695 F. Supp. at 1523-28. The Second Circuit, however, disagreed, affirming the denial of injunctive relief, but only on the ground of laches. 873 F.2d at 577, 583-85. In the second case, *New Era Publications International, ApS, v. Carol Publishing Group, 729* F. Supp. *992 (S.D.N.Y. 1990), rev'd*, 904 F.2d 152 (2d Cir. 1990), *cert. denied*, 498 U.S. 921 (1990), the district court held that there was no fair use, but the Second Circuit disagreed, holding that there was a fair use but without overruling the result of the first case.

From the standpoint of the potential biographer, the message from the above cases is chilling. Although there is some chance of ultimately prevailing in a copyright suit brought by a disgruntled subject, there is certainly no guarantee. Indeed, there is the very real likelihood that this possible vindication will require an expensive district court proceeding and an appeal to a circuit court. The risk of suit and the expense of defense therefore give biographers a very real incentive to avoid controversy by seeking approval of their work from their subjects.

B. The Sixth Circuit's decision violates the First Amendment because it permits the censorship of unpleasant criticism.

A sound First Amendment analysis of this case begins by remembering that Respondent sued because it resented Petitioners' criticism of its copyrighted work. This interest is unrelated to the monetary incentives provided by copyright, and it shows that the Sixth Circuit's decision violates the First Amendment.

Since the Respondent's claim is unconnected to copyright's financial incentives, it is clear that the Sixth Circuit's decision cannot stimulate any new creativity to compensate for the loss of Petitioners' critical expression. This means that the usual justification for copyright's suppression of speech is absent. Moreover, Respondent's motivation for suit is clearly its desire to censor unpleasant criticism. Enforcement of Respondent's claim would therefore threaten the quality, as well as the quantity, of speech available to the public.

Of course, Respondent will likely contest the assertion that its suit constitutes censorship which is unrelated to copyright's monetary incentives. Instead, Respondent may contend that its suit protects the economic value of its copyright by preventing Petitioners' unlicensed criticism from diminishing the public's opinion of "Oh, Pretty Woman."[24] *Amici* submit that this argument only strengthens the First Amendment aspects of this case.

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[24]Respondent may also claim that it intends to market its own parody some day, and that its suit protects this market. As this brief has already shown, however, this assertion is simply false.

If there is anything that is well established in our First Amendment jurisprudence, it is the principle that speech cannot be suppressed merely because someone finds it offensive or critical. The strength of this principle is demonstrated by the wide variety of contexts in which it has been applied to vindicate free speech interests. *See, e.g., R.A.V. v. City of St. Paul*, 60 U.S.L.W. 4667 (1992); *Cohen v. California*, 403 U.S. 15 (1971); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Street v. New York*, 394 U.S. 576 (1969). Moreover, this Court has steadfastly applied the principle to protect critical speech from the claim that it harms the criticized subject's public perception or reputation.

For example, this Court has held that "preserving the flag as a symbol of nationhood and national unity" cannot justify prosecution of those who use the flag as the platform for their unpopular views. *Texas v. Johnson*, 491 U.S. 397, 410-20 (1989). Similarly, the Court has invalidated a federal statute which permitted actors to wear military uniforms "if the portrayal does not tend to discredit that armed force." *Schact v. United States*, 398 U.S. 58 (1970). Finally, this Court has even prevented individuals from suing their critics in all but the most egregious circumstances. If the subject of criticism is a public figure or a product sold by a public figure, the criticism must be a false factual statement published with knowing or reckless disregard for the truth. Even if the subject is a private figure, the action is

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Respondent has had nearly thirty years to exploit this market, and it has not done so. *Amici* submit that the reason for this is Respondent's desire to suppress the criticism which is inherent in parodies like Petitioners'.

prohibited unless a showing of fault can be made. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964) (setting forth public figure standard); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1975) (setting forth limits on actions by private figures); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (applying *New York Times* standard against action brought to protect product from criticism). Of course, since parodies seldom make statements of fact, they are fully protected by the First Amendment even if they are highly caustic and offensive to their targets. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (protecting parody under First Amendment).

The reasoning behind these decisions is quite important to the case at hand. If the free marketplace of ideas is to work, people must be given room to criticize each other. Since both sides of a dispute cannot both to be right, the First Amendment necessarily contemplates participation in the free marketplace of ideas by the uttering of criticism which others will find revolting. *Gertz*, 418 U.S. at 339-340 ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."). This is especially true if the target of the criticism is a public figure or an object of public interest. *See Hustler*, 485 U.S. at 51 (noting that public figures are particularly appropriate targets of "vehement, caustic, and sometimes unpleasantly sharp attacks"). More important, if people could be sued because others found their speech offensive, many who might otherwise speak would not do so for fear of being sued by someone who disagreed. Thus, the First Amendment even protects offensive statements which are of dubious value in order to

ensure full participation in the free marketplace of ideas. *See Gertz*, 418 U.S. 340-341 (stressing the need to avoid self-censorship); *New York Times*, 376 U.S. at 279 ("Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.").

Together, the cases discussed above conclusively show the unconstitutionality of Respondent's case. First, cases like *Johnson* and *Schact* simply forbid laws which preserve the value of public symbols by preventing their use as a platform for critical expression. At heart, Respondent wants to preserve its song's image by keeping the Petitioners from using the song as the basis for criticism. This motivation is no different than the government's desire to preserve the flag as a symbol of national unity or its desire to ensure favorable portrayal of the armed forces.

Second, cases such as *New York Times, Gertz*, and *Bose* show that the free speech interests vindicated in *Johnson* and *Schact* are equally preeminent when individuals bring actions to protect their reputations or the products they sell. In this case, Respondent is a music publisher which actively promotes itself to the public and offers its song for public sale. Respondent and its song are therefore public figures who are particularly fair targets for criticism. Thus, Respondent's action cannot succeed unless Petitioners published a false statement of fact with actual knowledge or reckless disregard of the truth. Of course, since Petitioners' song makes no factual statement about Respondent or its song, this requirement cannot be satisfied.

Finally, the reasoning of cases like *New York Times, Gertz* and *Hustler* makes it vitally important to protect Petitioners even if this Court has doubts about the quality or value of their work. This is because there are many unquestionably valuable parodies whose existence is threatened by the Sixth Circuit's decision. If this Court allows Respondent to win, offended copyright holders will censor many of these parodies by bringing similar actions of their own. The public will then lose the valuable opinions and expressions that parody uniquely provides. Accordingly, it is important for this Court to protect Petitioners' parody not only for its own value, but for the value of other parodies not before the Court.[25] A First Amendment decision in favor of Petitioners is therefore clearly correct.

CONCLUSION

The key observation in this case is the fact that Respondent, Acuff-Rose Music, Inc., sued the Petitioners, Luther Campbell *et al.*, because Respondent resented the criticism inflicted by Petitioners' parody. Respondent's suit therefore represents an attempt to accomplish private censorship through copyright, and not an interest in exploiting the market for parodies of its song "Oh, Pretty Woman." Because of this fact, a decision affirming the Sixth Circuit's opinion would violate

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[25] *Hustler v. Falwell*, 485 U.S. 55 ("There is no doubt that the caricature of respondent and his mother is at best a distant cousin of the political cartoons [which contribute most to the free marketplace of ideas], and a rather poor relation at that. If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard...").

basic copyright policy and harm the public interest, Furthermore, such a decision would take copyright beyond limits imposed by the First Amendment. For these reasons, *amici* respectfully urge this Court to reverse the decision of the Sixth Circuit and reinstate the decision of the Middle District of Tennessee.

Dated: May 17, 1993

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER R. CAMPBELL A/K/A LUKE SKYYWALKER, CHRISTOPHER WONGWON A/K/A FRESH KID ICE, MARK ROSS A/K/A BROTHER MARQUIS, DAVID HOBBS A/K/A MR. MIXX; PROFESSIONALLY KNOWN AS THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

—v.—

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF PEN AMERICAN CENTER, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Authorities ii

Brief of Amicus Curiae..... 1

Interest of Amicus..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT

THE SIXTH CIRCUIT'S RIGID AND MECHANICAL APPLICATION OF THE FAIR USE FACTORS IS CONTRARY TO THE PURPOSE OF THE COPYRIGHT LAW AND DEPRIVES THE PUBLIC OF THE BENEFIT OF NON-COMPETITIVE PARODY 4

A. The Songs in Question..... 4

B. The Sixth Circuit Decision..... 5

C. The Flaws In the Sixth Circuit Decision 6

1. The Failure to Apply the Four-Part Test..... 10

2. The Misapplication of the Four-Part Test..... 11

3. A New Parody Test..... 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

	Page
Bleistein v. Donaldson Lithographing Company, 188 U.S. 239 (1903) . .	12
Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) . .	12
Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539 (1985) .	1,3, 11
New Era Publications, ApS. v. Henry Holt and Company, 873 F.2d 576 (2d Cir. 1989) cert. denied, 493 U.S. 1094 (1990)	11
Salinger v. Random House, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987) .	11
Walt Disney Products v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), cert. denied sub nom., O'Neill v. Walt Disney Products, 439 U.S. 1132 (1979)	12
Yankee Publishing Inc. v. News America Publishing, Inc., 809 F. Supp. 267 (S.D.N.Y. 1992)	13

STATUTES

P.L. 102-192, 106 Stat. 3145 (October 24, 1992)	11

BRIEF AMICUS CURIAE of PEN American Center

THE INTEREST OF THE AMICUS CURIAE *

PEN American Center ("PEN") is an organization of 2,400 novelists, poets, essayists, translators, playwrights, and editors, chartered to defend free and open communication within all nations and across national boundaries. American PEN has taken a leading role in attacking restrictive laws, rules, regulations and practices that censor, curb, or limit freedom of speech or expression in the nation.

As an organization of writers, PEN recognizes that the proper application of the copyright law assists authors -- and ultimately the public -- by giving authors an economic incentive to create those works. By protecting authors against any unauthorized use of their creations that would deprive them of the proper economic value of their writings, copyright law serves the interests of authors and readers alike.

By the same token, authors are often consumers and borrowers of material previously written by others. To paraphrase the famous remark of Sir Isaac Newton, all writers "stand on the shoulders of giants," in the sense that they use the facts, ideas, concepts or the style and technique of those who wrote before them. No author begins on a clean slate. As Justice Brennan stated in *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 582 (1985)(Brennan, J. dissenting): "Were an author able to prevent subsequent authors from using concepts, ideas and facts contained in his or her work, the creative process would wither and scholars would be forced into unproductive replication of the research of their predecessors."

---

* Letters of consent to the filing of the within amicus brief are being lodged with the Clerk of the Court simultaneously with the filing.

Not only do authors use prior material created by others *as a resource*, but they also makes it a *point of reference*, for later creative activity. Most writing is a reaction or a response to prior ideas, theories or arguments. It is a given that a published work may be quoted extensively by a later author for the purposes of comment, criticism and analysis. In addition, since expository writing is not the only way in which society presents and debates its governing principles, often a prior work is used in other ways as a jumping off point for additional observation and comment. In particular, a prior work should be able to be used through other literary devices, such as parody and satire. So long as the later use is not a substitute for, and therefore a direct competitive danger to, a prior creation, such use should be widely allowed.

In the case now before the Court, the Court below applied a mechanical and rigid approach to the question of parody in the music field. But the rule it established applies to literary creation as well. The Sixth Circuit interpreted the protection of the copyright law so expansively as to limit the ability of creative artists in every field to use prior material for constructive, non-competitive purposes. Because the decision below, by its overprotective ruling on the scope of the fair use doctrine relating to parody, significantly restricts the ability of authors to use previously published material, the Amicus urges the Court to reverse the decision below.

SUMMARY OF ARGUMENT

Viewed from the perspective of the copyright decisions of this Court, the Sixth Circuit opinion flies in the face of this Court's analysis in *Harper & Row, Publishers, Inc v. Nation Enterprises*, 471 U.S. 539 (1985). That case made clear that the determination of fair use under Section 107 of the copyright law involves a four part test, in which the commercial use of copyrighted material is only one element to be considered in the total calculus of fair use. The Sixth Circuit has converted the four-part test embodied in Section 107 into a one-part test: the only issue that appears to count is whether a commercial use was made of the original material.

Even though, in the case now before the Court, a parodist took original material openly and for the avowed purpose of using it in a totally different way, the Court of Appeals did not appreciate the humor in the situation and decided that not enough criticism or comment on the original material was made. "Failing a direct comment on the original, there can be no parody," 972 F.2d at 1436, n. 8. It appears to have seen its role as that of a musical or literary critic, rather than as a court interpreting a law that promotes creative activity while accommodating the right of all to express themselves.

The conclusion reached by the Court below cannot be squared with either the words of the statute, this Court's decision in *Harper & Row* or the need to accommodate First Amendment interests in interpreting the Copyright Law.

Furthermore, the approach taken by the Court below totally ignores the importance of parody as a literary art form. As noted above, prior copyrighted material is often used as a point of reference for later authors, and no rigid rule should be established that would undercut such use for satire and parody. It would be a appalling anomaly if the principles of copyright, which are designed to assure the "progress of science

which are designed to assure the "progress of science and the useful arts," (Const. Art. I, Sect. 8, cl. 8) are now applied to act as a barrier to that progress.

ARGUMENT

I.

THE SIXTH CIRCUIT'S RIGID AND MECHANICAL APPLICATION OF THE FAIR USE FACTORS IS CONTRARY TO THE PURPOSE OF THE COPYRIGHT LAW AND DEPRIVES THE PUBLIC OF THE BENEFIT OF NON-COMPETITIVE PARODY

A. The Songs in Question.

The two songs at issue in this case come from opposite sides of the popular music spectrum. Respondent's work "Oh, Pretty Woman," was written and recorded by Roy Orbison and William Dees in 1964, and has become a pop music standard. It gained renewed popularity after it became the theme song of the successful 1991 film, "Pretty Woman" with Richard Gere and Julia Roberts.

The original song describes how a "pretty woman," is "walking down the street, Pretty woman, Girl -- you look so sweet." The woman rejects the advances of the male admirer, but later changes her mind, to the joy of the singer. The girl in the song is attractive, admired and finally becomes interested in her suitor. The tone of the song is lyrical, soft and sweet, and the music, with a country rock rhythm with moderate electric instrumentation, is rich and soothing. Its message is whimsical seduction.

Petitioner's song has a totally different feel and theme. The "pretty" women who is the subject of the "2-Live Crew" song is not someone longed-for and admired by the singers.

Big Hairy woman -- You need to shave that stuff.

Big Hairy woman -- You know I bet its tough.

Big Hairy Women -- all that hair ain't legit, Cause you look like "cousin it."

Two timin' woman -- Girl, you know it ain't right.

Two timin' Woman -- You's out with my boy last night.

Two timin' Woman -- That takes a load off my mind.

Two timin' Woman -- Now I know that baby ain't mine.

The genre of petitioners' song is rap music, which is about as far removed from the Roy Orbison song as is possible in the field of popular music. Two-Live Crew is known for the blunt, misogynist message of its songs and the hard rhythm of its beat. This message is communicated in both lyrical content and musical form. Petitioners use the same drum beat and bass riff as Roy Orbison did to start the song, but the soft message of the original is immediately diverted when a "scraper" is used to distort the melody and the first soloist sings off key. As the district court described the musical process, "four times during the parody, 2 Live Crew repeats Orbison's bass riff over and over again, double the number of times on the original, until the riff begins to sound like annoying scratch on a record," 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991).

B. The Sixth Circuit Decision

Despite the great distance in theme and musical approach between the two songs and the different audiences to which they were directed, the Sixth Circuit decided that there could be no finding of fair use. The Court came to its erroneous result because of its

inflexible and crabbed analysis of the four fair use factors found in Section 107 of the Copyright Law.

It began its analysis by holding that because the 2-Live Crew recording was "included on a commercially distributed album," its use was presumptively unfair, 972 F.2d at 1436. "We find that the admittedly commercial nature of the derivative work . . . requires the conclusion that the first factor weighs against a finding of fair use." id. at 1437.

It then held that the second factor -- the nature of the copyrighted work -- also weighed against a finding of fair use since Respondent's song was a creative and artistic work, and less scope is afforded to quotation from such works. id., at 1437.

With respect to the third factor, the amount and substantiality of the use, the Sixth Circuit concluded that a substantial amount of original material was taken: ". . . the copying was qualitatively substantial." Furthermore the "heart of the original" work was taken and was made into the "heart of a new work." id. at 1438. This amounted to a "purloin[ing of] a substantial portion of the original," id.

Finally, the Sixth Circuit concluded that the final factor -- the effect upon the potential market -- also tipped in favor of the Respondent. This Court has determined this factor to be the most important of the elements described in Section 107. The Court below held that the commercial nature of the use precluded any finding of fair use. ".. . the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists." 972 F.2d at 1438.

C. The Flaws In the Sixth Circuit Decision

The inadequacies of the Sixth Circuit's decision can be shown by applying the court's analysis to some other famous parodies in English literature. Everyone

recognizes and admires the famous nonsense lyrics in Lewis Carroll's *Alice in Wonderland*. But to the audiences of the time, the lyrics were even more pointed and telling since they were obvious parodies of the sentimental and cloying Victorian verse of the late Nineteenth Century -- moralizing poems, "written for the edification of the young." [2] For example, Robert Southey wrote a melodramatic poem called "The Old Man's Comforts and How He Gained Them." The first two stanzas read as follows:

> *"You are old, Father William," the young man cried;*
> *"The few locks which are left you are gray;*
> *You are hale, Father Williams - a hearty old man:*
> *Now tell me the reason, I pray."*
>
> *"In the days of youth," Father William replied,*
> *"I remembered that youth would fly fast,*
> *And abused not any health and my vigor at first,*
> *That I never might need them at last."*

Lewis Carroll used the lyrics as a basis to write his famous "Father William" poem:

> You are old, Father William, the young man said,
> "And your hair has become very white;
> And yet you incessantly stand on your head-
> Do you think, at your age, it is right?"

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2 See Dwight MacDonald's anthology, "*Parodies: An Anthology from Chaucer to Beerbohm -- And After*" (1985) at 278. The lyrics that follow are found in that collection at 279-282.

"In my youth," Father William replied to
his son,
"I feared it might injure the brain;
But now that I'm perfectly sure I have
none,
Why, I do it again and again."

Similarly, Dr. Isaac Watts wrote a poem, "Against Idleness and Mischief" as a moral lesson for youth:

How doth the little busy bee
Improve each shining hour,
And gather honey all the day
From every opening flower!

How skillfully she builds her cell!
How neat she spreads the wax!
And labors hard to store it well
With the sweet food she makes.

In works of labor or of skill,
I would be busy too;
For Satan finds some mischief still
For idle hands to do....

Lewis Carroll's version is as follows:

How doth the little crocodile
Improve his shining tail,
And pour the waters of the Nile
On every golden scale!

How cheerfully he seems to grin,
How neatly spreads his claws,
And welcomes little fishes in
With gently smiling jaws!

Another well-known Victorian poem was David Bates' "Speak Gently:"

Speak Gently; it is better far
To rule by love than fear;
Speak gently; let no harsh word mar
The good we may do here.

Speak gently to the little child;
Its love be sure to gain;
Teach it in accents soft and mild;
It may no long remain.

Lewis Carroll sent a different message:

Speak roughly to your little boy,
And beat him when he sneezes;
He only does it to annoy,
Because he knows it teases.

I speak severely to my boy,
I beat him when he sneezes;
For he can thoroughly enjoy
The pepper when he pleases!

If Robert Southey, Dr. Isaac Watts and David Gates were current authors and *Alice in Wonderland* had been written today, there is little doubt that under the Sixth Circuit analysis, Lewis Carroll would be guilty of copyright infringement. There is no question but that Lewis Carroll wrote *Alice in Wonderland* for commercial gain -- he hoped to make money from the book. The poems written by Messrs. Southey, Watts and Gates were creative, artistic works and thus subject to very limited appropriation by others. Substantial portions of the earlier works were unquestionably "taken" by Carroll-- whole lines in the Southey and Watts poems were copied and the meter and rhythm of each of the other poems, as well as their basic structure, were also used. Finally, since commercial use was made of this material by Carroll (through publication and sale of his books) and the authors involved could conceivably have parodied their own works and made money from them, the fourth fair use would also have weighed in their favor.

Any method of analysis that would lead to the conclusion that fair use would not apply to Lewis Carroll's creations leaves much to be desired.

The Sixth Circuit approach to the question of fair use in parody cases is deficient in at least three respects: (1) the Court in fact did not apply the four-part fair use test, but applied a one-part test in which the commercial use of the material dictated the result under each of the factors; (2) even if the Court had applied the four-part test, it did not take into account the fact that a parodist must use considerable amount of copyrighted material to "conjure up" or present the original in order to satirize or burlesque it; a court cannot make literary judgments about the exact minimum quantity that could be copied to make the parodists' point; (3) in parody cases, the four-part test should be modified if not scraped altogether and the court should focus primarily on the issue of whether the parody is a substitute for the original.

1. The Failure to Apply the Four-Part Test.

The initial error of the Court below was its refusal to properly apply the four fair use factors of Section 107. What the Court did was to apply a single factor analysis -- it held that since the 2-Live Crew song was commercially distributed, than that automatically required a finding of infringement and precluded any finding of fair use. The same element of alleged commercial use dictated the result in the application of all fair use factors.

Thus, according to the Sixth Circuit, the commercial nature of the song required a finding that (1) the use of the song was improper; (2) the taking of the copyrighted song by a commercial user afforded less scope for copying; (3) the amount taken was substantial given the commercial nature of the use; (4) the effect upon the market was considerable, since defendant's use was "commercial."

That is not what Congress decreed in Section 107 or what this Court held in the *Harper & Row* case. In Section 107, Congress noted that in determining whether a particular use was fair, courts should consider the "purpose and character of the use, `including` whether such use was of a commercial nature," indicating that it was one of a number of factors to weigh.

Furthermore, in its recent amendment to Section 107, Congress rejected any single factor analysis in determining fair use. Congress amended the law in 1992 to insure that all four factors be separately analyzed. It added the following sentence to the law: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is based upon consideration of all the factors." P.L. 102-192, 106 Stat. 3145 (October 24, 1992). The law was passed in reaction to some decisions of the Second Circuit that seemed to overemphasize the unpublished nature of the work as key to a finding of fair use. See *Salinger v. Random House*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (9187) and *New Era Publications, ApS. v. Henry Holt and Company*, 873 F.2d 576 (2d Cir. 1989) *cert. denied*, 493 U.S. 1094 (1990).

This Court in *Harper & Row* noted that the commercial use was a separate "factor that tends to weigh against a finding of fair use," 471 U.S. at 562, again indicating that it was not the sole determining factor. The Sixth Circuit's decision which placed such great and critical emphasis on the commercial nature of the use misconstrued the law.

2. The Misapplication of the Four-Part Test.

To the extent the Sixth Circuit attempted to apply the four-part test, it did so without a proper recognition of how the courts should weigh the various factors, particularly in a parody case. The Court noted that the four part test has to be modified to some extent since by definition there is a substantial "taking" of copyrighted material when a parody is created. But the

Court gave this truism very grudging recognition. The Court quoted from *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied sub nom., O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979) to establish the following test: "Whether the parodist has appropriated a greater amount of the original work than is *necessary* to 'recall or conjure up' the object of his satire." (emphasis added).

Every court and commentator has noted that enough of the original material must be "conjured up" to be used by the parodist for his or her purposes. The audience must be "set up" by certain expectations that are triggered by viewing or listening to the some of the original.

In the Lewis Carroll instances, the Victorian audience had to be reminded of the lofty moral sentiments of the flowery verses created by Southey and others. Enough of the earlier material had to be used to elicit those reactions and expectations. Once those sentiments were generated by exposure to some of the original, the parodist could pull his or her surprise and dazzle and overwhelm the audience by the unexpected turn taken in the new creation.

But it not up to the courts to determine exactly how much of the original "is *necessary* to 'recall or conjure up' the object of his satire," as the Sixth Circuit noted. Courts are not equipped to determine the exact amount of material that would create the critical expectations, or to decide that a lesser amount would have sufficed, or that the parody did not work. That is the function of the author or composer. Courts cannot make those sort of judgments. As Justice Holmes stated in another context in *Bleistein v. Donaldson Lithographing Company*, 188 U.S. 239, 251 (1903): "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations outside of the narrowest and most obvious limits." See also *Esquire, Inc. v. Ringer*, 591 F.2d 796, 805 (D.C. Cir. 1978):

"Neither the Constitution nor the Copyright Act authorizes the . . . federal judiciary to serve as arbiters of national taste."

Judge Pierre Leval has made the same comment with respect to parody, see *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 281 (S.D.N.Y. 1992). In holding that a parody cover of the "Farmer's Almanac" was protected by the First Amendment, he commented:

> It is one thing to reject a First Amendment claim because the court disbelieves the claim that a communicative message was intended. It is quite another to reject a First Amendment claim because the court gives low marks to the success of the literary device. Courts are ill-equipped to pass literary judgments.

That is precisely what the Sixth Circuit did here. In rejecting the claim of fair use as parody, the Court noted: "Failing a direct comment on the original, there can be no parody," 972 F.2d at 1436, n. 8. By deciding that more than "necessary" amounts of the original material was taken and that the parody did not work because there was no comment on the original, the Court misapplied its role and came to an erroneous conclusion as to the correct legal rule to be applied in a parody-fair use situation.

3. A New Parody Test.

The above analysis leads to the following conclusion: the four factor fair use test cannot be applied in the same way or perhaps should not be applied at all in a parody situation. The first fair use factor contemplates that a second user would use earlier material in a critical manner, for educational, research or news-reporting or on a different level of use. But in parody, the original material must be close to the second use or the expectations on which the parodist depends cannot be created.

With respect to the second factor, creative material is almost always used by a parodist since distinctive elements of style and theme must be played with, copied and built-upon.

With respect to the third factor, substantiality of use, by definition, substantial parts must be used in a parody.

In short, if the fair use factors are applied in their normal manner, a parodist would find it difficult to succeed in any case, without considerable modification and distortion of the factors by the courts.

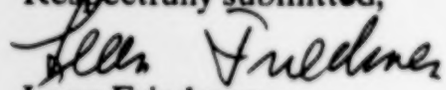
The solution may lie in focusing on the fourth factor, which this Court has already determined to be the most important. Unless the parodist uses original material in a manner that acts as a direct substitute for the first creation, there should be no finding of infringement. The test would require a showing that customers were diverted from buying or using the original, not because the parody illuminated the weaknesses or shallowness of the first creation, but because the second work served the same purposes and answered the same need as the original for the same type of audience.

That test was not evenly remotely met here. The district court properly determined that the basic purpose of parody was met and that the use should be allowed. That finding should have been affirmed.

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER R. CAMPBELL, *et al.*,

Petitioners,

—v.—

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

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34pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. FAIR USE IS A MEANS OF FOSTERING CREATIVITY AND INNOVATIVE EXPRESSION 2

II. THE FAIR USE DOCTRINE PROVIDES BROAD PROTECTION FOR PARODY, WHICH HAS PLAYED AN IMPORTANT ROLE IN THE DEVELOPMENT OF POLITICS AND ART 6

A. Parody In Politics 7

B. Parody In The Literary Arts 11

C. Parody In The Visual Arts 14

D. Parody In The Musical Arts 17

III. THE COURT SHOULD HOLD THAT COMMERCIAL PARODIES PRESUMPTIVELY DO NOT THREATEN THE POTENTIAL MARKET FOR AN ORIGINAL WORK, AND THAT SUCH USES OF COPYRIGHTED MATERIAL PRESUMPTIVELY ARE FAIR 20

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Benny v. Loew's Inc.,
239 F.2d 532 (9th Cir. 1956)
aff'd by an equally divided Court,
356 U.S. 43 (1958) 20

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329 F.2d 541 (2d Cir.),
cert. denied, 379 U.S. 822 (1964) 20, 21, 24

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984) 4

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482 F. Supp. 741 (S.D.N.Y.),
aff'd, 623 F.2d 252 (2d Cir. 1980) 20, 21

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794 F.2d 432 (9th Cir. 1986) 20, 21, 22, 23, 24

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471 U.S. 539 (1985) 3, 4, 6, 22, 23, 24

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485 U.S. 46 (1988) 4, 7, 20, 25

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Page

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IN ENGLISH (1967) 11

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Standard," 103 Harv.L.Rev. 1105 (1990) 5, 6

Lipman, Jean, and Marshall, Richard,
ART ABOUT ART (1978) 14, 15, 16, 17

Manet, Edouard,
"Olympia" (1863) 14, 15

Melville, Nimmer, B., and
Nimmer, David,
NIMMER ON COPYRIGHT (1992) 21, 22

Note, "The Parody Defense To Copyright
Infringement: Productive Fair Use
After Betamax,"
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& AMERICAN AUTHORS
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"The Anti-Romanticist," *in*
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"Manet's Olympia" (1974) 15, 16

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Have Only Humorous Notes,"
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Page

Richardson, Samuel,
PAMELA: OR, VIRTUE REWARDED (1740) 11, 12

Rivers, Larry,
"I Like Olympia in Blackface" (1970) 15

SAMUEL RICHARDSON, PAMELA: OR,
VIRTUE REWARDED
(William Sale ed. 1958) 12

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ROSIE IN SQUANDERLAND (1936) 9, 10

Strickland, Carol,
THE ANNOTATED MONA LISA (1992) 14, 15

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"Thirty Are Better Than One" (1963) 17

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MARRIAGE: FIELDING'S MIRROR
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Efficiency In Copyright Law,"
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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has been a vigorous advocate of free speech rights and has supported an interpretation of the copyright laws that is consistent with those rights. In furtherance of its principles, the ACLU has appeared before this Court in numerous free speech cases, including the leading copyright case of *Harper and Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). In addition, the ACLU has recently established an Arts Censorship Project specifically to address questions of artistic freedom, including social and political commentary and parody.

Accordingly, the issues presented by this case involve matters of direct concern to the ACLU. We therefore submit this brief *amicus curiae* to assist the Court in its deliberations.

SUMMARY OF ARGUMENT

Because the question for review as framed by the Court is whether petitioners' commercial parody is a fair use under 17 U.S.C. §107, this case does not require the Court to consider how parody should be defined for purposes of the Copyright Act or whether petitioners' work falls within that definition. Rather, the issue for the Court is the proper application of §107.

The Copyright Act of 1976, 17 U.S.C. §§101 *et seq.*, grants copyright owners a broad range of rights in their original works, but also limits those rights in a number of important ways. One of the most significant limita-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

tions on a copyright owner's rights is fair use, codified at 17 U.S.C. §107, which exempts from the Act's restrictions uses of copyrighted material for purposes such as criticism, comment, news reporting, teaching, scholarship and research. Fair use promotes the advancement of the arts and sciences by giving persons other than the copyright owner the reasonable right to use copyrighted material. Whether a particular use of copyrighted material is a fair one is to be decided on a case-by-case basis.

As the text and legislative history of §107 make clear, Congress intended works of parody to be protected as fair uses. Throughout history, parody has played an important role in the development of politics and art, and that role has been recognized in court decisions that broadly have protected such works under the fair use doctrine. The decision of the Sixth Circuit in this case, which threatens the traditional protection afforded parody, results from an overly literal application of this Court's only two fair use decisions since the 1976 codification of the principle. To assure that parody receives the protection it requires to flourish, the Court should hold that a commercial work of parody presumptively does not threaten the potential market for an original work, and presumptively is a fair use of the copyrighted material.

ARGUMENT

I. FAIR USE IS A MEANS OF FOSTERING CREATIVITY AND INNOVATIVE EXPRESSION

The Copyright Act of 1976, 17 U.S.C. §§101 *et seq.*, represented Congress' first overhaul of the copyright laws since 1909. While the 1976 Act grants copyright owners a broad range of rights in their original works, including control over derivative works based on the original, 17 U.S.C. §§102, 103, it also limits those rights by excluding from the owners' control certain socially

beneficial uses of their material, *see, e.g., id.* at §§107, 108, or by making the works subject to compulsory licenses. *See, e.g., id.* at §115.[2] The most obvious limitation on a copyright owner's rights is the limited term for which copyright protection is granted. *Id.* at §§302-04. An equally important limitation is contained in §102, which provides that ideas and concepts themselves cannot be copyrighted; rather, only the manner in which ideas and concepts are expressed qualify for such protection. *Id.* at §102. These limitations guarantee the public access to the fundamental building blocks of creativity, and give recognition to the settled notion that "[t]he fortunes of the law of copyright have always been closely connected with freedom of expression." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 430 n.12 (1984).

Another significant limitation on a copyright holder's rights involves the fair use of his or her copyrighted material. Fair use is a "'privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without [the copyright owner's] consent.'" *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 549 (1985)(*quoting* Horace G. Ball, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

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[2] Section 115 provides, in pertinent part, that:

> [a] compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, *but the arrangement shall not change the basic melody or fundamental character of the work* . . . .

17 U.S.C. §115(a)(2)(emphasis added). Thus, while artists who wish to re-record an existing copyrighted work can obtain a compulsory license, they can do so only if their re-recording leaves intact the "basic melody or fundamental character of the work." *Id.* A compulsory license was not available to the petitioners in this case because their parody altered the fundamental character of Roy Orbison's and William Dees' original work.

The doctrine is "one of the most important and well-established limitations on the exclusive right of copyright owners," H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5678)(hereinafter "House Report"), and is "'a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained.'" *Harper & Row*, 471 U.S. at 549 (quoting Ball, *supra* p.3, at 260).

By promoting the broad dissemination of creative works, the fair use doctrine helps assure that debate on political and artistic matters is "uninhibited, robust, and wide-open . . . ." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Discourse on these subjects is "'essential to the common quest for truth and the vitality of society as a whole,'" and the Court has been "particularly vigilant to ensure that individual expressions" on these issues "remain free from governmentally imposed sanctions." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988)(*quoting Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984)). To be sure, fair use "creates tensions between the Copyright Act's goal of protecting an author's works and first amendment principles of ensuring the unimpeded flow of information . . . ." Sarah Deutsch, "Fair Use in Copyright Law and the NonProfit Organization: A Proposal for Reform," 34 Am.U.L.Rev. 1327, 1328 (1985). The doctrine therefore calls for a careful balancing of "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other . . . ." *Sony,* 464 U.S. at 429. Properly considered, fair use is not an "occasionally tolerated departure from the grand conception of the copyright monopoly . . . [but rather] a necessary part of the

overall design." Pierre N. Leval, "Toward a Fair Use Standard," 103 Harv.L.Rev. 1105, 1110 (1990).

Prior to its codification as part of the Copyright Act, fair use existed only as a common law principle. House Report at 65. Codification of the doctrine in §107 of the Act[3] was intended to restate prior law and not "change, narrow, or enlarge it in any way." House Report at 66. Nevertheless, Congress in §107 "identifie[d] [the] various factors that enable a court to apply an 'equitable rule of reason' analysis to particular claims of infringement." *Sony,* 464 U.S. at 448 (footnote omitted). Congress singled out "criticism, comment, news reporting, teaching . . . scholarship, or research" as the kinds of fair uses of copyrighted material that should be encouraged. 17 U.S.C. §107.

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[3] Section 107 provides:

> [n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. 17 U.S.C. §107 (Supp. 1993).

The Court has observed that §107 requires "a case-by-case determination whether a particular use is fair," *Harper & Row,* 471 U.S. at 549, and that inquiry need not be limited to consideration of the four factors set forth in the statute. "The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright." Leval, *supra* p.5, at 1110-11. Because parodies have been important in the development of politics and art, §107 should be applied in a manner that broadly protects those works.

II. THE FAIR USE DOCTRINE PROVIDES BROAD PROTECTION FOR PARODY, WHICH HAS PLAYED AN IMPORTANT ROLE IN THE DEVELOPMENT OF POLITICS AND ART

Congress intended §107 to provide broad protection for parody as a form of fair use. That intent is reflected in the text of the section, which, as noted earlier, explicitly provides that the use of copyrighted works "for purposes such as criticism [or] comment" is a favored use. *Id.* In addition, both the Senate and House reports prepared in connection with passage of the 1976 copyright law revisions list as an example of "the sort of activities the courts might regard as fair use" the "use in a parody of some of the content of the work parodied." S. Rep. No. 473, 94th Cong., 1st Sess. 61 (1975)(hereinafter "Senate Report"); House Report at 65. The Senate and House reports mirrored the views expressed in a report prepared by the Register of Copyrights which argued that a statutory codification of the fair use doctrine should be broad enough to include works of parody. U.S. Register of Copyrights, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (July 1961).

The legislative history of §107 reflects the fact that parody has been vital to the development of politics and art. Charles C. Goetsch, "Parody as Free Speech -- The Replacement of the Fair Use Doctrine by First Amendment Protection," 3 W. New Eng.L.Rev. 39, 42 (1980). "The reason for the universal appeal of parody is twofold: Its high potential as a form of entertainment and its high potential as a vehicle for social and literary criticism." *Id.* at 41. Such works draw "'our attention to the defects of some authors, whose stilted language, and grandiloquent phrases, have veiled their poverty of ideas, their sham sentiment, and their mawkish affectations.'" Note, "The Parody Defense To Copyright Infringement: Productive Fair Use After Betamax," 97 Harv.L.Rev. 1395 & n.4 (1984)(*quoting* 1 Walter Hamilton, Introduction to I PARODIES OF THE WORKS OF ENGLISH & AMERICAN AUTHORS I (W. Hamilton ed. 1884)).

To be sure, parodies may treat their subjects harshly or with outright disdain or contempt. But the pointed humor of such expressions is precisely what makes them deserving of broad protection under the copyright laws. *Cf. Hustler,* 485 U.S. at 54 ("[d]espite their sometimes caustic nature . . . graphic depictions and satirical cartoons have played a prominent role in public and political debate"). Society would be a far poorer place were it not for the enduring works of parody that have spurred the development of politics and art.

A. Parody In Politics

Parody has been used for centuries to mock and criticize political opponents, government policies, politicians and the political process itself. For example, in late 1776, the New York press printed a parody of the Declaration of Independence, which had been signed only months earlier. Bruce Granger, POLITICAL SATIRE IN THE AMERICAN REVOLUTION, 1763-1783, at 128 (1960). The

parody opened with the actual preamble to the Declaration of Independence, but then substituted a list of alleged abuses by the Continental Congress for the list of Royal abuses contained in the original. Like the original, the parody concludes with a declaration:

> [w]e therefore . . . do renounce and disclaim all allegience, duty, or submission to the Congress, or to any government under them; and declare that the united Colonies, or States so called, neither are, nor of right ought to be, independent of the Crown of Great-Britain . . . and in the support of this Declaration . . . [w]e mutually pledge to each other, and to the Crown and Empire of Great Britain, our lives, our fortunes, and our sacred honor.

Id. at 129 (quotation and citation omitted).

Not all parody created during the founding of the Nation focused on matters as exalted as liberty and independence. Professor Granger notes that near the end of the Revolutionary War, the new Congress' inability regularly to pay its soldiers caused a rise in desertions and short-term enlistments. *Id.* at 201. Congress' financial problems became particularly acute in 1780, prompting the issuance of an emergency order stating that "the officers who shall continue in the service to the end of the war, shall . . . be entitled to half pay during life, to commence from the time of their reduction." *Id.* (quotation and citation omitted). Congress' action led to a parody of the Lord's Prayer:

> Our Delegates in Congress Assembled, Revered be your Characters, your power increased, your will be done in the civil as it is in the Military Line, Give us Month by Month our monthly pay, Pay us our debts as we wish to Satisfy our Creditors, And lead us not into poverty but deliver us the evils of desbandation, for yours is the right, the power, and the Generous intention of rewarding us with half pay throughout our Lives Amen.

Id. (quotation and citations omitted).

In our century, President Franklin Roosevelt was the target of one parodist's acid humor in ROSIE IN SQUANDERLAND, a 1936 work written "[w]ith apologies to Lewis Carroll." J. Lewis Stackpole, ROSIE IN SQUANDERLAND 2 (1936). The parody, subtitled *Billions For Votes*, parrots the style of Lewis Carroll's classic children's work, ALICE IN WONDERLAND (1838), and features, among others, the characters of Rosie ("Franklin D. Roosevelt") and the Dormouse ("The Taxpayer"). *Id.* The cover of the book depicts President Roosevelt in Alice's familiar hoop skirt, with Alice's long wavy hair, pulling a white rabbit out of a hat. *Id.* at 1. As *Rosie In Squanderland* begins:

> Rosie was lying on a soft bank composed of the fortune of bonds and stock certificates which she had inherited from her ancestors, thrifty people who had saved more than they spent.
>
> She was fast falling into a doze, dreaming of all the ways she would like to spend other people's money . . . .

Id. at 3. In the story, Rosie, like Alice, encounters a White Rabbit who leads her on a curious journey. At one point, Rosie says to the White Rabbit:

> You don't know me . . . . The same rules that apply to other people, don't apply to me. For instance, I can pull myself out of debt by spending more and more money. No one else has ever been able to do that. But I can, because . . . it is not my money.

> It belongs to the Dormice, and they are just too damn dumb to understand what I am doing to them.

Id. at 5 (quotation omitted). By the end of the parody, the Dormouse begins to question Rosie's view of the world, leading the Hatter and March Hare to proclaim in unison:

> Twinkle, twinkle, little Rosie. How I wonder what this cosey New Deal system would become, If all Dormice weren't dumb?

Id. at 19 (quotation omitted).

More recently, "the tensions between Foreign Service officers and the inner circle surrounding [former] Secretary of State James A. Baker 3d [were] vented in a wicked parody of the State Department employee newsletter." Robert Pear, "At State, The Acid of Distrust Corrodes," N.Y. Times, April 12, 1989, at A16. The parody, which was dated April 1, was "billed as a lighthearted spoof in the spirit of April Fools' Day." *Id.* However, the parody revealed "a measure of distrust" that one expert said "reflects what a lot of people feel in [the State Department] building." *Id.* (quotation omitted).

In the style of the State Department newsletter, the parody reported that "[t]he Baker team has let it be known that it is very difficult to be a small island of skilled bureaucrats in the middle of a sea of inept Foreign Service officers." *Id.* (quotation omitted). Another item reported that in "a major step toward showing trust to the department's career employees," the Secretary of State had "introduced himself to his personal secretary the other day." *Id.* (quotation omitted). The spoof, which "[l]ike all telling humor . . . has a kernal of truth in it[,]" was said to have hit the mark to such a great degree that it left the Secretary of State "seething." *Id.*

B. Parody In The Literary Arts

Parody in literature first appeared in ancient Greece and since has been instrumental in the development of Western literature. Not only is literary parody a unique brand of literary criticism, it is also an important literary genre and a rich and vibrant source of humor. Linda Hutcheon, A Theory of Parody 2, 29 (1985); George Kitchin, ed., A Survey of Burlesque and Parody in English ix (1967). As a form of literary criticism parody is unique. By exaggerating or distorting the qualities of an original work, literary parody offers an inside look at the weaknesses of an original text and thus "differs from other kinds of literary criticism in that it breathes the very spirit of the style or idea it seeks to criticize." Robert P. Falk, ed., American Literature in Parody 14 (1955). Parody "seize[s] upon sham and pretense in the literary world and point[s] out the difference between originality and flim-flam." *Id.*

In addition, many parodies are valuable works of literature wholly apart from the objects of their ridicule. Henry Fielding's Shamela (1741) and Max Beerbohm's A Christmas Garland (1912) are often cited as parodies that rival or exceed the objects of their derision. Ronald Paulson, "The Anti-Romanticist," *in* Modern Critical Views: Henry Fielding 60-61 (H. Bloom ed. 1987); John Felstiner, "Max Beerbohm and the Wings of Henry James," *in* The Surprise of Excellence 206-07 (T.G. Riewald ed. 1974). Fielding's Shamela is widely regarded as "one of the most famous and effective parodies of English literature." David Baguley, "Parody and the Realist Novel," 55 U. Toronto Q. 94, 95 (1985).

Fielding's work ridicules both the style and substance of Samuel Richardson's epistolary novel Pamela: or, Virtue Rewarded (1740), which itself was widely acclaimed upon publication. Wilbur L. Cross, The History of Henry Fielding 302 (1918). The appeal of Richardson's novel was based on the character and morality of

Pamela, its narrator and heroine. Unlike many other literary characters of the period, Pamela, a young servant, was bright and virtuous. Over the course of the novel, she outwits the bumbling and numerous advances of a Mr. B--, the well-to-do son of Pamela's deceased mistress. After repeatedly fleeing Mr. B--'s clutches and finally returning to her parents' home with her virtue intact, Pamela is asked to marry Mr. B--, and eventually does so, thereby becoming a "lady." Richardson's message is that propriety and chastity in women will be rewarded, in this case through marriage to a wealthy man.

SHAMELA contains many of the same scenes as PAMELA, but the plot and narration are altered in order to ridicule Richardson's suggestion that sexual virtue leads to financial reward. Fielding's Shamela still winds up marrying the equivalent of Mr. B--, whom Fielding names "Mr. Booby," but the two are married because Shamela's "innocence" is used in cunning fashion to lure Mr. Booby to her. Fielding's subtle humor is revealed by comparing Shamela's reaction to her suitor's romantic advances to that of Pamela. In PAMELA, Richardson describes how Mr. B-- "offered to take [Pamela] on his knee, with some force," and "by force kissed [her] neck and lips." SAMUEL RICHARDSON, PAMELA: OR, VIRTUE REWARDED 25 (William Sale ed. 1958). Horrified by Mr. B--'s behavior, Pamela frees herself from his clutches and runs to safety. *Id.* at 26.

In describing the same encounter, Fielding's heroine writes in a letter that Mr. Booby "caught me in his arms, and kissed me till he made my face all over fire . . . . O! What precious fools men are! And so I flung from him in a mighty rage, and *pretended as how* I would go out at the door; but when I came to the end of the room, I stood still, and my master cryed out . . . come hither . . . ." Henry Fielding, JOSEPH ANDREWS AND SHAMELA 312 (Martin Battestin ed. 1961)(emphasis added). As one scholar has observed, "[t]he key to the parody

here resides in Fielding's words 'pretended as how'; for although Shamela makes a calculated show of indignation and does not want to leave the room, Pamela did run from it in spite of her desire for Mr. B-- in marriage." Maurice Johnson, FIELDING'S ART OF FICTION 28 (1961). As the passages illustrate, "Fielding annihilates Pamela's morality by skillfully manipulating Richardson's own inventions." Murial Brittain Williams, MARRIAGE: FIELDING'S MIRROR OF MORALITY 50 (1973). In SHAMELA, "characters, scenes, and even dialogue are often reproduced *almost identically*" from Richardson's original work. *Id.* (emphasis added).

In this century, Max Beerbohm has shown that parody remains a vital genre. In his collection, A CHRISTMAS GARLAND, Beerbohm pokes fun at the works of 17 authors, from Rudyard Kipling to Joseph Conrad. Beerbohm, *supra* p.11, at vii (1926). Perhaps the most famous among the collection is "A Mote in the Distance," a send-up of the writings of Henry James. Felstiner, *supra* p.11, at 206. In "A Mote," Beerbohm parodies James by describing simple events in James' intricate narrative style. For example, in describing a character's wake from sleep, Beerbohm writes that,

> [t]he consciousness of dubiety was, for our friend, not, this morning, quite yet clean-cut enough to outline the figures on what she had called his "horizon," between which and himself the twilight was indeed of a quality somewhat intimidating.

Beerbohm, *supra*, at 3. By capturing the idiosyncratic aspects of James' style -- "brokenly qualified sentences," "syntactical quibbles," "metaphors worried and reworried," Felstiner, *supra* p.11, at 206 -- Beerbohm's story becomes as much James' work as his own. One authority on Beerbohm has written that "A Mote" is a "perfect mimicry of [James'] style . . . . [T]he parody is like the original because, in both, part of the reader's pleasure

comes from discovering those inherently caricatural touches where the style proclaims itself as Jamesian." Lawrence Danson, MAX BEERBOHM AND THE ACT OF WRITING 150 (1989).

C. Parody In The Visual Arts

Parody has served as a particularly important developmental tool in the visual arts. Historically, artists have learned their craft by copying the original works of recognized masters. As one art historian has noted, "[c]opying or quoting from earlier cultural artifacts were the early approved methods of instruction for young visual artists." Bruce Allistair Barber, "Appropriation/Expropriation: Convention or Intervention?," 33 Parachute 29, 30 (1983). For the visual artist, "copying . . . is one method . . . of learning, of acquiring new knowledge and skills with which to gain control over one's world." *Id.*

Throughout history, as young artists have matured, they often have progressed from literal copying of great works to parodying them. Hutcheon, *supra* p.11, at 35. By parodying masterpieces, artists allow for immediate comparisons of their works with those of recognized authorities on the subject. Admittedly, the viewer of a parody feels "a certain jolt when [h]e first recognize[s] the ingredients of this visual pun" that has been created; however, "[h]e also sense[s] that it was a stroke of genius to put them together in this unique way." H.W. Janson, HISTORY OF ART 11 (3d ed. 1986).

One of the most beloved Modernist painters, Edouard Manet, was a master of parody. His famed work, "Olympia" (1863), pokes fun at Titian's "Venus D'Urbino" (1538) and other Renaissance portrayals of female nudes. Manet's "Olympia" copies the pose of Titian's "Venus": a reclining figure, head to the left, her body propped up by pillows. Jean Lipman and Richard Marshall, ART ABOUT ART 98 (1978). *See also* Carol Strickland, THE ANNOTATED MONA LISA 71, 101 (1992). In

Manet's version, the reclining figure is being presented a bouquet of flowers by a black maidservant. *Id.* However, in contrast to Titian, whose ethereal subject was the goddess Venus, Manet not only depicts a human figure, but a prostitute with a bow tied around her neck and a flower behind her ear. *Id.* at 101. Far from the soft Renaissance ideal, Manet's Olympia has been called "a female gorilla" because of her muscular appearance. *Id.* at 71. Manet's choice of a human figure -- and indeed a prostitute -- mocks Titian's idealized selection of a goddess. *Id.*

Interestingly, Manet's work has itself been the subject of parodies by later artists. The two best known parodies of "Olympia" were created by Larry Rivers and Mel Ramos. Larry Rivers' "I Like Olympia in Blackface" (1970) contains two distinct images. The top half of the construction depicts Manet's "Olympia" while the bottom half reverses the races of Manet's original subjects, resulting in a white maidservant waiting on a confident, reclining, black female. As two art historians have noted:

> Larry Rivers's painted construction doubled Manet's idea for another kind of social comment, showing, like a transformed mirror image, a new white servant for the now black Olympia . . . .

Lipman and Marshall, *supra* p.14, at 99. *See also* Strickland, *supra* p.14, at 71. More recently, Mel Ramos created "Manet's Olympia" (1974), a work that copies many elements of the Manet original: the pose of the reclining nude, the pillows, the bow around her neck and the maidservant presenting the bouquet of flowers. However, in contrast to the original, Ramos' Olympia is soft, voluptuous and coquettish. Moreover, in contrast to the imprecise, patchy colors used by the modernist Manet, Ramos has applied a hard, glossy finish to his work that makes his subject look like a *Playboy* centerfold. Hutcheon, *supra* p.11, at 47. Professor Hutcheon has

written that,

> through a second level of parody (of *Playboy* pinups) the narcissism of modern woman [is what] is satirized. Perhaps Ramos is also suggesting, by the parodic juxtaposition, that what we find erotic today may, indeed, not have changed. He reworks Manet's Olympia . . . in much the same way [as Manet reworked his subject from Titian].

Id.; *see also* Lipman and Marshall, *supra* p.14, at 99.

During the twentieth century, parodies in the visual arts have become even more bold. Both Marcel Duchamp and Andy Warhol, for example, have borrowed not only elements of the original works of others, but in some instances the entire original work itself. Examples of this brazen kind of parody are seen in both artists' remakes of Leonardo DaVinci's "Mona Lisa" (1506). The original "Mona Lisa" is well known. The painting depicts a serene female seated in three-quarters view, wearing a brown dress. Leonardo's subject has sleek, dark hair parted down the center, and a complexly inward smile that perhaps is her best-known feature. Duchamp's 1915 parody of Leonardo's work is an exact copy of the original with two alterations. First, Duchamp appended a large black moustache to the subject's angelic face. Second, he changed the title of the work to "L.H.O.O.Q." which, when pronounced in French, makes a distinctly "off-color pun." Janson, *supra* p.14, at 693; Lipman and Marshall, *supra* p.14, at 57. But Duchamp's fun at the expense of Leonardo did not stop there. Duchamp continued his play on "Mona Lisa" in 1965 by signing an unaltered reproduction of the Leonardo original and calling it "L.H.O.O.Q. Shaved." Lipman and Marshall, *supra* p.15, at 57. Thus, in his original parody, Duchamp negated the authority of the Leonardo masterpiece by defiling it with graffiti. Next, Duchamp negated his negation by removing the offending material and simply re-

producing the original with a new title.

Finally, in classic pop-art fashion, Andy Warhol's 1963 parody, titled "Thirty Are Better Than One," shows thirty identical images of the Mona Lisa silk-screened onto one canvas in checkerboard fashion, six across and five down. Warhol's point was unmistakable:

> [t]he pop ironic commentary is clear in his title -- Thirty Are Better Than One -- implying a satire of a consumer society that loves quantity more than quality and therefore can use a popular icon of highbrow art [repeated thirty times] as a mass-produced product.

Hutcheon, *supra* p.11, at 47; *see also* Lipman and Marshall, *supra* p.14, at 57.

D. Parody In The Musical Arts

Like writers and visual artists, musical composers have used parody throughout the centuries as a form of creative expression designed to deflate the authority of existing compositions and musical standards. The operatic genre, with its strict conventions and grand aspirations, has provided much of the source material for musical parodists over the ages. Michael Tilmouth, "Parody (ii)," *in* THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 239 (Stanley Sadie, ed., 1980). Hundreds of parodies were written in the seventeenth and eighteenth centuries of the enormously popular but pompous French operas. The French operas' "unrelieved solemnity . . . [t]heir high-flown sentiments, their pretentious diction, all naturally stimulated the ribaldry of irreverent spirits. Under such circumstances, parody was almost inevitable." Grout, Donald J., "Seventeenth Century Parodies of French Opera -- Part I," 27 The Musical Quarterly 211, 219 (1941).

Opera is not the only musical genre that has fallen prey to the irreverent and critical voice of the musical parodist. Masters of the classical era have also exposed

the absurdities of their craft. For example, "[e]ven the great Mozart, sublime practitioner of the classical art, got in his digs at some of the musical foibles of his own time. His . . . [composition] entitled 'A Musical Joke' mimics some of the cliches rampant among the lesser composers of the 18th century, and does so with practiced drollery and even a touch of cruelty." Alan Rich, "The Bach Whose Works Have Only Humorous Notes," 20 Smithsonian 84 (Feb. 1990). Parody has been employed by such other classical masters as Wagner, Bartok and Debussy. Tilmouth, *supra* p.17, at 240. For example, in his popular "Concerto For Orchestra," Bartok interrupts the "Intermezzo" section with a mocking quotation of Shostakovich's "Symphony No. 7" lasting nearly a third of the section. As one musicologist has written of the Bartok parody:

> trumpets give a Bronx cheer; high strings and woodwinds shriek derision . . . woodwinds trail off in giggles; trombones fart, *glissando*. The whole wind band combines trills with an um-pah bass to introduce . . . violins in a varied repetition of the Shostakovich tune . . . .

William Austin, "Bartok's Concerto for Orchestra," *in* 18 The Music Review 21, 37 (G. Sharp ed. Feb. 1957). Similarly, in "The Golliwog's Cakewalk," "Debussy quotes the opening motive of Wagner's 'Tristan' [and 'Isolde'], thumbs his nose at it with a few *staccato* chords, and reharmonizes its top melody in a banal cadence." *Id.* at 39.

The tradition of parody in classical music, like that in opera, derives from the fact that the "conventions of classical music are weighed down with enough artificialities, stiff-backed formalities and just plain absurdities that merely recounting them straight, or with the slightest shading of emphasis, can induce high hilarity." Rich, *supra* p.18, at 84. Perhaps the foremost modern-day

practitioner of the classical parody is Peter Schickele, whose compositions under the name "P.D.Q. Bach" spoof "music's most-venerated mannerisms." *Id.* at 86. Schickele's "1712 Overture," for example, is "an observant takeoff" on Tchaikovsky's much-loved "1812 Overture." *Id.* at 88. Tchaikovsky's composition features a battle, complete with cannons, between a lushly arranged Russian folk melody and several other competing tunes, with the first folk melody ultimately emerging triumphant over its "enemies." P.D.Q. Bach's parody replicates Tchaikovsky's theme, but uses equally lush arrangements of such familiar melodies as "Yankee Doodle" and "Pop! Goes the Weasel" to play out an intricate musical battle amidst the exploding balloons that replace Tchaikovsky's cannons. *Id.*

Musical parody has, of course, also flourished outside the operatic and classical realms. For example, a popular form of musical parody in early seventeenth century England was found in the "city comedy." The city comedy arose in response to the emotional extravagance of the Elizabethan theatre, for which William Shakespeare's works set the standard. Linda Phyllis Austern, "Musical Parody in the Jacobean City Comedy," *in* 66 Music & Letters 355 (Edward Olleson et al., eds., Oct. 1985). The city comedy eschewed "[k]ings, courts and countryside" for the realistic settings and manner of speech of contemporary seventeenth century London. *Id.* A classic example of parody in the city comedy comes from Act IV of Thomas Dekker's and John Webster's 1605 work, "Northward Ho." *Id.* at 358. In their work, Dekker and Webster borrow an innocent lover's ballad from the songbook of an Elizabethan songwriter and transform it into a lewd "parody of fallen womanhood" sung by a "comical old bawd." *Id.* As one scholar has written:

> [a] simple alteration of the [original] text renders it as irreverently obscene as the

> singer herself, for the intense emotion and frustrated passion of the original are transformed into a hilariously unsentimental image of the basest sort of physical love . . . .

Id. at 359.[4]

III. THE COURT SHOULD HOLD THAT COMMERCIAL PARODIES PRESUMPTIVELY DO NOT THREATEN THE POTENTIAL MARKET FOR AN ORIGINAL WORK, AND THAT SUCH USES OF COPYRIGHTED MATERIAL PRESUMPTIVELY ARE FAIR

Courts have not hesitated broadly to protect works of parody as fair uses and, in so doing, explicitly have recognized parody's role in the development of politics and art. *See, e.g., Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986);[5] *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Warner Bros., Inc. v. ABC, Inc.*, 720 F.2d 231 (2d Cir. 1983); *Elsmere Music, Inc. v. NBC Co.*, 482 F.Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980); *Berlin v. E.C. Pub., Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). *But see Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956)(parody not to be treated differently from other kinds of infringements), *aff'd by an equally divided Court*, 356 U.S. 43 (1958).[6] For example, in *Berlin*, 329 F.2d 541, Judge Kaufman, writing for a panel that included then-Judge Marshall, rejected composer Irving Berlin's arguments that parodies of his songs published by *Mad Magazine* infringed the copyrights for the original material. Berlin contended, in particular, that *Mad's* use was not a fair one because the Magazine had a commercial motive. *Id.* at 543. However, the court held that that argument failed to recognize "parody and burlesque as independent forms of creative effort possessing distinctive literary qualities worthy of judicial protection in the public interest." *Id.* The court concluded that "parody and satire *are* deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism." *Id.* at 545 (emphasis in original). *See also* 3 Melville, B. Nimmer and David Nimmer, NIMMER ON COPYRIGHT, §13.05[C] at 13-102.25 -- 102.26 (1992)("[o]nly by the recognition of a fair use defense is society likely to reap the benefit of [parody]").

Likewise, in *Elsmere*, 623 F.2d 252, the district court protected as a fair use a parody of the "I Love New York" advertising jingle performed on the popular television show "Saturday Night Live." The court held that the parody, which focused on a mythical city called Sodom and was entitled "I Love Sodom," was a fair use because it was "clearly an attempt . . . to satirize the way in which New York City has attempted to improve its somewhat tarnished image through the use of a slick advertising campaign." *Id.* at 745. The Second Circuit affirmed the district court's judgment upon the simple observation that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody . . . ." 623 F.2d at 253.

Finally, in *Fisher*, 794 F.2d 432, the Ninth Circuit held that a commercial parody of the 1950s classic song "When Sunny Gets Blue" was a fair use. In its opinion, the Ninth Circuit observed that parodies "'play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author.'" *Id.* at 437-38 (*quoting* Note, *supra*

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[4] The similarities to the work at issue in this case are unmistakable.

[5] The *Hustler* case involved the unauthorized copying of the same satirical cartoon at issue in this Court's opinion in *Hustler*, 485 U.S. 46.

[6] Later, in *Walt Disney Prods. v. The Air Pirates*, 581 F.2d 751, 757 n.13 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979), the Ninth Circuit repudiated *Benny*, stating that "we necessarily disagree with [*Benny's*] dictum that a parody is treated no differently than any other taking."

p.7, at 1411). Of particular importance in this case, the Ninth Circuit specifically rejected the copyright owner's contention that the defendant's use of the original material was not a fair one because he had asked for and been refused permission for a license. *Id.* at 437. Indeed, the court held that "[t]he parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought." *Id.* *See also* Melville, Nimmer and Nimmer, *supra* p.21, at §13.05[C] at 13-102.26 ("satire, etc., of the work itself by its very nature is unlikely to be the subject of a license from the author of a serious work"); Alfred C. Yen, "When Authors Won't Sell: Parody, Fair Use, And Efficiency In Copyright Law," 62 U.Colo.L.Rev. 79, 90 (1991)("[b]ecause parodists seek to lampoon original works, they are unlikely to secure permission from the copyright holder to use the copyrighted material").

The Sixth Circuit's decision in this case jeopardizes the traditional protection afforded parody by applying in overly literal fashion language in *Sony* and *Harper & Row* concerning the effect of a derivative work's commercial nature on the §107 analysis. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1436, 1438 (6th Cir. 1992). In *Sony*, the Court considered whether the makers of video tape recorders ("VTRs") were contributory infringers of the copyrights held by television production companies. 464 U.S. at 420. Sony, a maker of VTRs, contended that home videotaping was a noncommercial fair use under §107, and the Court agreed. 464 U.S. at 454-55.

In the course of its *Sony* opinion, however, the Court suggested that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copy-

right . . . ." *Id.* at 451.[7] The Court also stated that harm to the potential market for the original work may be presumed if the derivative work is commercial in nature. *Id.* Thus, under *Sony*, if the derivative work at issue is commercial in nature, factors one and four of the §107 test presumptively will weigh in favor of the copyright owner and against the person seeking to use the copyrighted material, at least where verbatim copying is involved.

Those principles were reaffirmed in *Harper & Row*. There, the Court considered whether *The Nation Magazine* infringed the copyright held by Harper & Row for the then-unpublished memoirs of former President Ford. 471 U.S. at 542. *The Nation* obtained a copy of the unpublished manuscript and published verbatim excerpts of the work prior to its publication by Harper & Row. *Id.* at 543. The Court reversed the Second Circuit's finding that *The Nation*'s use of the manuscript was a fair one and, in so doing, reaffirmed the standards applied in *Sony*. 471 U.S. at 561-69.

When works of parody are at issue, the *Sony* presumptions applicable to the first and fourth §107 factors, *see* n.3, *supra*, fail to advance the policy underlying the Copyright Act. The fourth factor, which the Court has called "the single most important element of fair use," seeks to determine whether a derivative work "materially impair[s]" the potential market for the original material. *Harper & Row*, 471 U.S. at 566-67 (quotation omitted). When applying the test to a parody, the "economic effect of . . . the parody's critical impact must be excluded." *Fisher*, 794 F.2d at 437. Such an exclusion is required

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[7] The fact that a derivative work is commercial in nature, of course, is not dispositive of the fair use inquiry. 464 U.S. at 449. The *Sony* presumption is merely "'an express recognition that . . . the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.'" *Id.* at 449 n.32 (*quoting* House Report at 66).

because the "economic effect . . . with which we are concerned is not its potential to destroy or diminish the market for the original -- any bad review can have that effect -- but rather whether it *fulfills the demand* for the original. *Id.* at 438 (emphasis in original). Thus, the pertinent question is whether the parody usurps, and thereby fulfills, the demand for the original. Jay Dratler, Jr., "Distilling the Witches' Brew of Fair Use in Copyright Law," 43 U. Miami L.Rev. 233, 331 (1988).

As we have seen, the *raison d'etre* of a parody is to mock an original work and not to usurp demand for it in the marketplace. As the Ninth Circuit observed in *Fisher,* it is highly unlikely that the lover of an original work would instead purchase a parody of it, or vice-versa. 794 F.2d at 438. *See also Berlin,* 329 F.2d at 545. That is especially true here, where no reasonable person could think that a lover of the original ballad made famous by Roy Orbison would be satisfied by purchasing petitioners' version instead. Moreover, if we recognize that a parody and an original work fulfill different demands in the marketplace, then the fact that a parody is commercial in nature should not subject it to government-imposed restraints which otherwise could not be sustained. *Cf. Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. __, 112 S.Ct. 501 (1991)(commercial gain of authors irrelevant to whether their speech is protected); *New York Times Co. v. Sullivan*, 376 U.S. at 265-66 (same). Indeed, the Court has recognized that the copyright laws specifically are designed to offer financial incentives to those who produce creative works. *Harper & Row,* 471 U.S. at 546. Included among those numbers are the creators of parodies.[8]

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[8] The majority opinion in the court below suggests that not only must harm to the potential market for original work be considered, but also harm to the potential market for derivative works. 972 F.2d at 1439. Whatever validity that notion might have in other contexts, the Sixth (continued...)

The same analysis applies under the first §107 factor. A commercial parody should not be considered presumptively unfair simply because it is commercial in nature. Whether his work is good or bad, tasteful or not, the parodist advances the arts and sciences by offering a critical look at existing material. Because the demand for that work will not usurp demand for the original, there is nothing presumptively wrong with the use of the original material. One author has suggested that the first §107 factor has "at its core a simple issue: whether the type and purpose of the use fall within favored categories." Dratler, *supra* p.24, at 290. As we have seen, parody is a favored use and the applicable *Sony* presumption therefore fails to advance the policies underlying the Copyright Act when such works are at issue.

The Senate report accompanying the bill that became the Copyright Act of 1976 recognized that:

> [w]ith certain special exceptions (*use in parodies* or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.

Senate Report at 65 (emphasis added). In order to afford parody the broad protection that Congress intended it to have -- and that it needs to flourish -- the Court should hold that works of parody, though commercial in nature, presumptively do not threaten the market for the original copyrighted material and presumptively are fair uses.

---

[8] (...continued)
Circuit's analysis would undermine settled free speech principles when works of parody are at issue, for it would allow a copyright holder to control who criticizes his or her own work and the precise content of the criticism. *Cf. Hustler*, 485 U.S. at 56 (actual malice standard protecting critical speech "is necessary to provide 'breathing space' to the freedoms protected by the First Amendment").

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court below and instead affirm the judgment of the district court.

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(8)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER;
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE;
MARK ROSS, a/k/a BROTHER MARQUIS;
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE WARNER BROS., A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY, L.P., IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	2
SUMMARY OF ARGUMENT	2
ARGUMENT	
THE LOWER COURT ERRED IN ADOPTING A PRESUMPTION THAT COMMERCIAL USE OF COPYRIGHTED MATERIAL IS UNFAIR	4
I. The Copyright Act Provides That The Commercial Character Of A Use Constitutes Only One Of Many Considerations Governing Application Of The First Fair Use Factor	5
II. The Court's Precedents Do Not Support A Presumption That Commercial Uses Are Unfair	8
III. A Presumption That Commercial Uses Are Unfair Is Unworkable And Of No Determinative Value	10
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Acuff-Rose Music, Inc. v. *Campbell*, 972 F.2d 1429 (CA6 1992)	4-5
American Geophysical Union v. *Texaco, Inc.*, 802 F. Supp. 1 (SDNY 1992)	12, 13
Consumers Union of United States, Inc. v. *General Signal Corp.*, 724 F.2d 1044 (CA2 1983), *cert. denied*, 469 U.S. 823 (1984)	12
Harper & Row, Publishers, Inc. v. *Nation Enterprises*, 471 U.S. 539 (1985)	5, 8-10
Hustler Magazine, Inc. v. *Moral Majority, Inc.*, 606 F. Supp. 1526 1534 (CD Cal 1985), *aff'd on other grounds*, 796 F.2d 1148 (CA9 1986)	11
Iowa State University v. *American Broadcasting Co.*, 621 F.2d 57 (CA2 1980)	12
Maxtone-Graham v. *Burtchaell*, 803 F.2d 1253 (CA2 1986), *cert. denied*, 481 U.S. 1059 (1987)	12
Mills Music, Inc. v. *Snyder*, 469 U.S. 153 (1985)	6
Narell v. *Freeman*, 872 F.2d 907 (CA9 1989)	11, 12
Pacific and Southern Co. v. *Duncan*, 744 F.2d 1490 (CA11 1984), *cert. denied*, 471 U.S. 1004 (1985)	13
Rosemont Enterprises, Inc. v. *Random House, Inc.*, 366 F.2d 303 (CA2 1966), *cert. denied*, 385 U.S. 1009 (1967)	12
Salinger v. *Random House, Inc.*, 650 F. Supp. 413 (SDNY 1986), *rev'd on other grounds*, 811 F.2d 90 (CA2 1987), *cert. denied*, 484 U.S. 890 (1988)	10
Sega Enterprises Ltd. v. *Accolade, Inc.*, 977 F.2d 1510 (CA9 1992)	13
Sony Corp. v. *Universal City Studios*, 464 U.S. 417 (1984)	*passim*
Triangle Publications, Inc. v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (CA5 1980)	13
Weissman v. *Freeman*, 868 F.2d 1313 (CA2 1989), *cert. denied*, 493 U.S. 883 (1989)	12-13

STATUTORY PROVISIONS	
17 U.S.C. § 101	6
17 U.S.C. § 107	3, 5, 6, 7
P.L. 102-492 (Oct. 27, 1992)	8

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976)	6-7
H.R. Rep. No. 102-836, 102d Cong., 2d Sess. (1992)	7-8
S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER;
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE;
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DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
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v.

ACUFF-ROSE MUSIC, INC.,
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**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

BRIEF OF AMICUS CURIAE WARNER BROS., A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY, L.P., IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS

Amicus Warner Bros. engages in the production and distribution of motion pictures for exhibition in theatres and, over television and by means of videocassettes, in the home. These activities are, almost without exception, done on a commercial basis. The varied content of the motion pictures released by Warner Bros. includes romances, mysteries, thrillers, westerns, musicals, science fiction, and indeed, every topic and approach which can be developed by the ingenuity of motion picture creators.

Warner Bros. has a significant interest in the outcome of this case. As a major creator of copyrighted works, Warner Bros. supports a strong regime of copyright protection. Warner Bros. accordingly believes that fair uses of copyrighted material should be limited, and that such uses should not diminish the market for the original works.

As both a copyright owner and a fair user of copyrighted material, however, Warner Bros. is concerned with preserving the equitable balance that the fair use doctrine aims to achieve between proprietary interests of creators and the public interest in use and dissemination of expression. The case-by-case weighing of competing concerns that is inherent in and required by such an equitable doctrine is threatened by the Sixth Circuit's adoption in this case of a rigid presumption against commercial use of copyrighted material.

SUMMARY OF ARGUMENT

In *Sony Corp.* v. *Universal City Studios*, 464 U.S. 417, 449 (1984), the Court stated as dictum that the nontransformative copying of copyrighted television programming would be presumptively unfair if done "for a commercial or profit-making purpose." In concluding that private, noncommercial home videotaping of over-the-air broadcasts for purposes of time-shifting constitutes a fair

use, the Court stated that "although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of a copyright, noncommercial uses are a different matter." *Id.* at 451.

The Court's dictum in *Sony* concerning commercial uses has, in the lower federal courts, taken on a life of its own and a meaning wholly divorced from the limited context in which it was enunciated. Perhaps searching to avoid the case-by-case balancing required by the statute, some courts, including the Court of Appeals for the Sixth Circuit in the decision below, have misguidedly and almost talismanically incanted an unworkable and elusive presumption against commercial use that has no basis in the copyright statute, legal precedent, or legislative history.

The commercial or noncommercial character of a use is, of course, relevant to the fair use inquiry, as is the socially productive versus nonproductive character of a use. The Court should clarify, however, that no presumption attaches to the commercial consideration itself—with respect to either the first statutory fair use factor, "the purpose and character of the use," or the fourth statutory factor, "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. The court below erred in attaching presumptive weight to the commercial nature of petitioners' use and in thereby summarily concluding, without further analysis, that both the first and fourth statutory factors weighed against a finding of fair use. Accordingly, the decision below should be vacated and the matter reconsidered in light of an appropriate fair use standard as supported herein.[1]

---

[1] *Amicus* takes no position with respect to whether the use at issue in this case constitutes a parody and, if so, whether such a use constitutes a fair use.

ARGUMENT

THE LOWER COURT ERRED IN ADOPTING A PRESUMPTION THAT COMMERCIAL USE OF COPYRIGHTED MATERIAL IS UNFAIR

In the decision below, the Court of Appeals for the Sixth Circuit stated that it must "start from the position" that a use is unfair if it is commercial. *Acuff-Rose Music, Inc.* v. *Campbell*, 972 F.2d 1429, 1437 (CA6 1992). It based this analysis on its characterization of the Court's dictum in *Sony* that "[t]he use of a copyrighted work primarily for commercial purposes . . . [is] presumptively unfair." *Id.* at 1436. The Court of Appeals then applied its essentially irrebuttable presumption in such a manner as to conclude not only that the first factor weighed against a finding of fair use, but also that the fourth factor—the effect on the market value of the copyrighted work—weighed against fair use. *See id.* at 1438 ("In the instant case, the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists.").

In so doing, the court below made the inquiries under the first and fourth statutory factors coextensive with the determination of whether the nature of a use is commercial. It ignored other considerations that shape the purpose and character of a use, such as whether the allegedly infringing use builds or comments on the copyrighted material and thus is socially productive or transformative, or whether the user acted in good faith. The Court also dispensed with any attempt to analyze whether or how the transformative use might have diminished the market value of the copyrighted work.

Simply by labelling the work "commercial," therefore, the Court of Appeals dismissed two of the four statutory elements of the fair use defense. Because the Court has held that the fourth factor "is undoubtedly the single most important element of fair use," *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 566 (1985), the Sixth Circuit's presumption against commercial use effectively eviscerated more than half of the elements of the fair use defense. This primacy placed upon the commercial nature of the use is contrary to the copyright statute and unsupported by precedent, and constitutes an unworkable legal standard.

I. The Copyright Act Provides That The Commercial Character Of A Use Constitutes Only One Of Many Considerations Governing Application Of The First Fair Use Factor

The Copyright Act of 1976 (the "Act" or "Copyright Act") codified the judicially-created doctrine of fair use. *See Harper & Row*, 471 U.S. at 549. Section 107 of that Act, as amended in 1992, provides in part:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107.

It is elementary that when construing the scope of copyright protection afforded creators, the language of

the Copyright Act is the starting point for analysis. *See, e.g., Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985) ("In construing a federal statute, . . . [we] therefore start with an examination of the statutory text."); *see also Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); *id.* at 431 ("[T]he protection given to copyrights is wholly statutory.").

The Court of Appeals' decision is contrary to the statutory language governing fair use. Section 107 states that courts should consider "whether such use is of a commercial nature or is for nonprofit educational purposes" when weighing the first statutory fair use factor, "the purpose and character of the use." 17 U.S.C. § 107(1). However, by providing that the determination of the first factor shall "includ[e]" consideration of whether the use is commercial or educational, the statute is clear on its face that the commercial nature is not in itself dispositive of the purpose and character of the use. *See* 17 U.S.C. § 101 (defining "including" and "such as" as "illustrative and not limitative"). Moreover, the statute in no way suggests—much less provides—that the commercial nature is determinative of the fourth statutory fair use factor, the effect of the use on the market value of the copyrighted work.

The broad, non-exclusive statutory language governing the effect to be given a commercial use is consistent with congressional intent. In codifying the fair use defense, Congress

> amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration of "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, *the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.*

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 66 (1976) (emphasis added). Giving presumptive weight to the commercial nature of a use therefore contravenes the express non-exclusive language of the statute and the congressional purpose underlying it.

The structure and language of the entire fair use provision, in fact, preclude a presumption that undermines the case-specific nature of the defense. The four statutory fair use factors are themselves non-exclusive, *see* 17 U.S.C. § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include* . . . ." (emphasis added)) —as are the specified examples of the kinds of purposes for which a use of copyrighted material might be deemed fair. *See id.* ("[T]he fair use of a copyrighted work, *including* such use by reproduction in copies or phonorecords . . . , for purposes *such as* criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright." (emphasis added)).

Such explicitly nonpresumptive, non-exclusive language is consistent with Congress' intent in codifying the fair use defense. Congress expressly recognized that "the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute." H.R. Rep. No. 94-1476, *supra*, at 66. Accordingly, Congress "endorse[d] the purpose and general scope of the judicial doctrine of fair use" while maintaining that "the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." *Id.; see also* S. Rep. No. 94-473, 94th Cong., 1st Sess. at 62 (1975); *accord* H.R. Rep. No.

102-836, 102d Cong., 2d Sess. at 3 (1992) ("All claims of fair use must be judged on the totality of the facts in the particular case by balancing all the factors."); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 561 (1985) ("The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.").

Congress reinforced its commitment to a nonrigid doctrine when it amended Section 107 last year by adding the following: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." P.L. 102-492 (Oct. 27, 1992). In so amending the statute, Congress made clear that there should "be no per se rule barring claims of fair use" and that it did not intend "to direct the courts how much weight to give to any factor in a particular case." H.R. Rep. No. 102-836, *supra*, at 1; *see also id.* at 2 ("The goal of [the legislation] is to direct the courts to strike the correct balance on the facts before it, free from any *per se* rules."). Instead, "courts are to determine the affirmative defense of fair use . . . on a case-by-case basis" and "to give proper weight to all factors." *Id.* at 1.

A presumption that commercial uses are unfair therefore not only lacks support in the Copyright Act; it actually contravenes the express statutory language. By explicitly maintaining a case-by-case, equitable view of fair use, Congress rejected any attempt to presume certain categories of uses of copyrighted material to be unfair.

II. The Court's Precedents Do Not Support A Presumption That Commercial Uses Are Unfair

The Sixth Circuit's emphasis on the commercial nature of a use distorts the Court's dictum in *Sony*. The Court of Appeals improperly interpreted *Sony* as formulating

a universally applicable, judicially-created presumption which departs from the literal words of the statute. To interpret *Sony* as adopting a presumption against commercial uses that would make the fair use defense less available would be to elevate the Court's dictum above its holding.

So elevating the Court's dictum would mean ignoring the bulk of the Court's opinion that affirmed the fact-specific nature of the fair use defense. The Court in *Sony* explicitly and repeatedly noted that the fair use doctrine constitutes an " 'equitable rule of reason,' " 464 U.S. at 448, 454, and cited at length the legislative history stating that the defense is highly case-specific rather than governed simply by the commercial/noncommercial determination. *See id.* at 448-49 nn.31-32.

The Court even rejected the lower court's attempt to adopt a presumption against nonproductive uses, because it was unwilling to "rigidly circumscribe[]" the "sensitive balancing of interests" required in the fair use analysis. *Id.* at 455 n.40. Rather, the Court explicitly stated that "[t]he distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance," *id.*, thus effectively rejecting the possibility that *any* aspect of "the purpose and character of the use" is presumptively dispositive of the first factor. Given the facts and circumstances of that case, therefore, *Sony* should not be interpreted as adopting through dictum a generally applicable presumption that commercial uses are unfair. *See also Harper & Row*, 471 U.S. at 597 (Brenan, J., dissenting) (stating that the Court in *Sony* held "that the fair use inquiry could never be resolved on the basis of . . . a 'two dimensional' categorical approach").

Any question as to the meaning of the Court's dictum regarding commercial uses in *Sony* was definitively resolved in *Harper & Row*. The Court reaffirmed that presumptive categories are to be avoided in the fair use inquiry. *See* 471 U.S. at 561. It also refused to confine

analysis of the first statutory fair use factor to the commercial versus noncommercial character of the use. *See id.* at 562-63. Likewise, in determining the fourth fair use factor—the effect on the market—the Court in no way attached any presumptive weight to the commercial value obtained by the infringer through the use of copyrighted material. *See id.* at 566-69. Accordingly, the Court of Appeals for the Sixth Circuit erred in this case in relying upon this Court's dictum in *Sony* to support a presumption against commercial use. There is no basis in this Court's precedent for such a presumption which directly contravenes the language and intention of the Copyright Act.

III. A Presumption That Commercial Uses Are Unfair Is Unworkable And Of No Determinative Value

Not only is there no statutory or judicial support for a presumption against commercial use, but such a presumption should be rejected as unworkable. The statutory distinction between uses of a commercial nature and uses of a nonprofit educational purpose

> somewhat unrealistically paints the world into two corners—the venal commercial and the altruistic instructive. In fact, publishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers. And a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship. *The protection of the statute should not turn on sackcloth and missionary zeal. It rather directs the court to make an appraisal of social usefulness and of commercial fair play.*

Salinger v. *Random House, Inc.*, 650 F. Supp. 413, 425 (SDNY 1986) (emphasis added), *rev'd on other grounds*, 811 F.2d 90 (CA2 1987), *cert. denied*, 484 U.S. 890 (1988).

In practice, virtually all litigated uses of copyrighted material are of a commercial nature. The presumption

against commercial use, if literally applied, thus eviscerates the fair use defense. Indeed, when governed by such a "presumption," courts attempt to mitigate its harsh consequences by reintroducing equitable considerations in classifying the use as commercial or noncommercial. The presumption thus serves as little more than an impetus for courts selectively to invoke legal fictions to escape findings of unfair use. The results are anomalous and unpredictable. *See, e.g., Hustler Magazine, Inc.* v. *Moral Majority, Inc.*, 606 F. Supp. 1526, 1534 (CD Cal 1985) (religious fundamentalist group's use of ad parodying Rev. Jerry Falwell in mass mailing to group members was not commercial "merely because Reverend Falwell's use came in the course of an appeal for donations"), *aff'd on other grounds*, 796 F.2d 1148, 1152 (CA9 1986) (use of ad was of commercial nature because "defendants distributed copies of the parody as an integral part of a financial appeal"); *see also Narell* v. *Freeman*, 872 F.2d 907, 913-14 (CA9 1989) (romance novelist's use of historical work constituted fair use, even though presumption against commercial use weighed against first and fourth factors).[2]

---

[2] Although other courts have, like the Court of Appeals below, accorded undue weight to the dictum in *Sony*, it is noteworthy that even these other courts have not applied a presumption against commercial use in nearly so determinative or irrebuttable a fashion as did the court below. The district court in *Hustler* v. *Moral Majority*, for example, noted that "[e]ven if Falwell's use had been purely commercial, the court would conclude that the presumption of unfairness had been rebutted in this case." 606 F. Supp. at 1534-35. Central to this statement seemed to be the court's consideration of the socially productive or transformative nature of the use. The court noted that Falwell's use did not serve the same purpose as the original advertisement, but rather "meant to provoke the anger of his followers and to comment on the level of obscenity in the work." *Id.* at 1535, *aff'd*, 796 F.2d at 1152 ("Even assuming that the use had a purely commercial purpose, the presumption of unfairness can be rebutted by the characteristics of the use.").

Similarly, the Court of Appeals in *Narell* v. *Freeman* noted that even though the commercial nature of a use was presumptive as to

The Court of Appeals for the Second Circuit has rejected the presumption against commercial use that some courts have inferred from the Court's dictum in *Sony*, perhaps recognizing that the classification of a use as primarily commercial or noncommercial is inherently malleable and standardless. *Compare Iowa State University* v. *American Broadcasting Co.*, 621 F.2d 57, 61 (CA2 1980) (network's use, in telecast about gold-medal winner, of clips from student-produced film biography of a fellow student athlete and his quest for excellence was of a commercial nature because it "was not motivated solely by . . . beneficence"), *with Consumers Union of United States, Inc.* v. *General Signal Corp.*, 724 F.2d 1044, 1049 (CA2 1983) (use in advertising of copyrighted material from *Consumer Reports* praising company's vacuum cleaners held to "serve the important function of educating the public"), *cert. denied*, 469 U.S. 823 (1984).

The Second Circuit instead has held that *Sony* did not "alter[] the traditional multi-factor fair use inquiry," *Maxtone-Graham* v. *Burtchaell*, 803 F.2d 1253, 1262 (CA2 1986), *cert. denied*, 481 U.S. 1059 (1987), in which the commercial nature of the use has no more weight than the socially productive or transformative nature of the use. *See Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 307-09 (CA2 1966), *cert. denied*, 385 U.S. 1009 (1967); *see also Weissman*

---

the first factor, "[t]his court does consider the scope of fair use expanded (but not determinatively) if the original and copy do not serve the 'same intrinsic purpose.'" 872 F.2d at 914. Moreover, although "the likelihood of future harm" could "be presumed" by the defendant's use of the copyrighted material, the court held that the fourth factor weighed in favor of the infringer, because "[t]he works are directed to fundamentally different purposes." *Id.*

Accordingly, although many "courts ritualistically proclaim, almost as a mantra, that every commercial use is 'presumptively' unfair, that presumption is easily overcome by a transformative, nonsuperseding use." *American Geophysical Union* v. *Texaco, Inc.*, 802 F. Supp. 1, 13 (SDNY 1992).

v. *Freeman*, 868 F.2d 1313, 1324 (CA2 1989) (evaluating, for purposes of the first fair use factor, both whether the alleged infringer gained from the use, and whether the use was productive or for the same intrinsic purpose as the copied work), *cert. denied*, 493 U.S. 883 (1989); *accord Sega Enterprises Ltd.* v. *Accolade, Inc.*, 977 F.2d 1510, 1523 (CA9 1992) ("[W]e are free to consider the public benefit resulting from a particular use notwithstanding the fact that the alleged infringer may gain commercially."); *American Geophysical Union* v. *Texaco, Inc.*, 802 F. Supp. 1, 12 (SDNY 1992) ("The *Sony* holding did not overturn the preexisting concept that productive or transformative uses were favored over non-productive, merely superseding copies.").[3]

This Court should approve the reasoning of the Second Circuit in rejecting the presumption against commercial use as both unworkable and contrary to the Copyright Act and the Court's precedent. The Court should reaffirm the equitable nature of the fair use doctrine, thereby ensuring that the commercial nature of a use does not, as it did below, impermissibly negate two of the four statutory factors constituting a fair use defense.

---

[3] Even prior to *Sony*, it was well established that Section 107 of the Copyright Act "makes commercial motive relevant to fair use analysis. But it is certainly not decisive." *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (CA5 1980); *accord Pacific and Southern Co.* v. *Duncan*, 744 F.2d 1490, 1496 (CA11 1984) (post-*Sony* decision citing *Triangle* and looking to non-transformative as well as commercial nature of use in finding no fair use), *cert. denied*, 471 U.S. 1004 (1985).

CONCLUSION

For the reasons stated above, the Court should vacate the decision of the Court of Appeals for the Sixth Circuit and reconsider the matter in light of the legal fair use standard supported herein.

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Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE CAPITOL STEPS PRODUCTION, INC., MARK RUSSELL, BARRET E. HANSEN, BRUCE W. KERR, NANCY HOLSON, AND MICHAEL R. HUEY IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE UNDERLYING PURPOSE OF THE COPYRIGHT LAW, AND THE SOCIAL VALUE OF SATIRE AND PARODY, WEIGH HEAVILY IN SUPPORT OF ANY CLAIM THAT A SPECIFIC SONG PARODY IS A "FAIR USE."	4
A. The Fair Use Defense Is Essential to Parody and Satire	5
B. The American Tradition of Musical Parody and Satire Is Worth Protecting	7
C. Congress Intended That Parodies Be Protected as Fair Use When It Enacted Section 107	9
II. THE PETITIONERS' SONG "PRETTY WOMAN" IS A FAIR USE OF THE COPYRIGHTED WORK	10
A. Legitimate Parodists, Such as the Petitioners, Should Prevail on the First Fair Use Factor	10
1. The Sixth Circuit Erred in Finding That The Commercial Nature of a Parody Was Dispositive of the First Statutory Fair Use Factor	11
2. In Evaluating the First Statutory Factor, Weight Should Be Given to the Importance of Parody and Satire as a Means of Comment and Criticism	15
B. Creative Parodies, Such as the Petitioners' Work, Should Prevail on the Second Fair Use Factor When They Parody a Published Work	17

TABLE OF CONTENTS—Continued

	Page
C. The Sixth Circuit Misapplied the Substantiality Test as it Pertains to Song Parodies	18
D. The Fourth Statutory Fair Use Factor Requires Proof That a Commercial Parody Will Harm the Copyrighted Work	20
1. The Sixth Circuit Erroneously Substituted a Commercial Use Presumption for Proof of Economic Harm	20
2. The Presumption Employed by the Sixth Circuit Will Have a Chilling Effect on Protected Speech	23
3. The Argument That a Parody Interferes With the Right of a Copyright Owner To Profit From Its Own Parodies Is Without Merit	25
4. A Failure To Base Infringement Decisions on Proof of Economic Harm Will Lead to Regulation of Parody Based on the Popularity and Political Acceptability of the Parodist	26
CONCLUSION	28
APPENDICES	
A. Declaration of William Strauss	1a
B. Declaration of Mark Russell	11a
C. Declaration of Barret E. Hanson	15a
D. Declaration of Bruce W. Kerr	18a
E. Declaration of Nancy Holson	23a
F. Declaration of Michael Huey	27a

TABLE OF AUTHORITIES

CASES	Page
Acuff-Rose Music, Inc. v. Campbell et al., 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3667 (1993)	*passim*
Acuff-Rose Music, Inc. v. Campbell et al., 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd, Acuff-Rose Music, Inc. v. Campbell et al.* 972 F.2d 1429, (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3667 (1993)	10
Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956)	26, 27
Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir. 1964)	12, 15, 16, 23
Bloom & Hamlin v. Nixon, 125 F. 977 (C.C.E.D. Pa. 1903)	15
Columbia Pictures Corporation v. NBC, 137 F. Supp. 348 (S.D.Cal. 1955)	27
Elsmere Music, Inc. v. NBC Company, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980)	12, 16, 18
Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986)	6, 12, 16, 18
Folsom v. March, 9 F.Cas. 342 (No. 4901) (CC Mass. 1841)	4
Freedman v. Maryland, 480 U.S. 51 (1965)	24
Green v. Luby, 177 F. 278 (C.C.S.D.N.Y. 1909)	15
Green v. Mitsenheimer, 177 F. 286 (C.C.S.D.N.Y. 1909)	15
Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539 (1985)	5, 14, 17, 20, 21, 26
Hill v. Whalen, 220 F. 359 (S.D.N.Y. 1914)	5
In re The Yoder Company, 758 F.2d 1114 (6th Cir. 1985)	21
Iowa State University Research Fund v. American Broadcasting Companies, 621 F.2d 57 (2d Cir. 1980)	5
Keep Thompson Governor Comm. v. Citizens For Gallen Comm., 457 F. Supp. 957 (D.N.H. 1978)	23, 24
Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976)	21

TABLE OF AUTHORITIES—Continued

	Page
Loew's, Inc. v. Columbia Broadcasting System, Inc., 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom. Columbia Broadcasting System Inc. v. Loew's*, 356 U.S. 43 (1958) (affirmed *per curiam* by an equally divided Court)	26
MCA, Inc. v. Wilson, 672 F.2d 180 (2nd Cir. 1981)	28
Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977)	5
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	24
Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1982)	21
Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)	22
Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966)	23
Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)	23
Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 416, 104 S.Ct. 774 (1984)	4, 21, 24
Speiser v. Randall, 357 U.S. 513 (1958)	23
Stewart v. Abend, 495 U.S. 207 (1990)	5
Twentieth Century Music Corporation v. Aiken, 422 U.S. 151 (1976)	4
Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979)	27
Walt Disney Productions v. Mature Pictures Corporation, 389 F. Supp. 1397 (S.D.N.Y. 1975)	28
Warner Brothers, Inc. v. ABC, Inc., 720 F.2d 231 (2d Cir. 1983)	16, 17
Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991)	15

CONSTITUTION, STATUTES, AND LEGISLATIVE HISTORY

17 U.S.C. § 107, *amended by* PL 102-492 (1992)	3, 10, 17, 18, 20
Fed. R. Evid. 301	20
H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976)	10, 14

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 473, 94th Cong., 1st Sess. (1975)	10, 22
U.S. Constitution, Art. I, Sec. 8, Clause 8	4
U.S. Register of Copyrights, *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* (1961)	10

TREATISES

Ball, H., *Law of Copyright and Literary Property* (1944)	5
Goetsch, C., "Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection," 3 *W. New England Law Review* 39 (1980)	13, 23
Moore, J. & H. Bendix, *Moore's Federal Practice* (2d ed. 1988)	21
Nimmer on Copyright (1992)	5

OTHER AUTHORITIES

Boswell, J., *Life of Johnson* (1970)	12
Fielding, H., *Shamela* (1741)	7
Howard, J.T., *Our American Music: A Comprehensive History from 1620 to the Present* (1965)	8, 13
Kitchin, G., *Survey of Burlesques and Parody in English* (1967 ed.)	7
Lawrence, V., *Music for Patriots, Politicians, and President* (1975)	8, 29
Patterson & Lindberg, *The Nature of Copyright: A Law of Users' Rights* (1991)	4, 25
Smith, G., *Joe Hill* (1969)	9
The Oxford Classical Dictionary (1970)	7
Wall Street Journal, Sept. 5, 1990	9

BRIEF OF AMICI CURIAE
IN SUPPORT OF THE PETITIONERS

Capitol Steps Productions, Inc. (hereinafter "The Capitol Steps"), Mark Russell, Barret E. Hansen, Bruce W. Kerr, Nancy Holson, and Michael R. Huey respectfully submit this brief as *amici curiae* in support of the Petitioners. Consents of the parties have been lodged with the Clerk.

STATEMENT OF INTEREST

The *amici* participating in this brief are engaged in the business of writing, performing, or playing musical satire and parody. The Capitol Steps have been performing, in Washington, D.C. and nationally, for eleven years. Declaration of William A. Strauss, hereinafter "Strauss Dec.," attached to the brief as Appendix A, ¶¶ 1-2. A Capitol Steps performance consists primarily of song parodies, principally of copyrighted songs.

Mark Russell has been performing parody in the Washington, D.C. area and nationally for nearly 40 years. He regularly appears on national network radio and television. For the past 18 years, he has hosted his own "Mark Russell Comedy Specials" on public television. Declaration of Mark Russell, hereinafter "Russell Dec.," attached to the brief as Appendix B, ¶¶ 2-3. Along with spoken material, Mark Russell performs song parodies to both coyprighted and original melodies.

Barret E. Hansen, professionally known as "Dr. Demento," has since 1970 conducted a weekly radio program consisting primarily of humorous songs, including song parodies. The program has been nationally syndicated since 1974, and is currently heard on approximately 100 stations nationwide. Declaration of Barret E. Hansen (hereinafter "Hansen Dec."), attached hereto as Appendix C.

Bruce W. Kerr is a professional singer and song parodist in Mountain View, California, and has been engaged in that profession for over twenty years. Decla-

ration of Bruce W. Kerr (hereinafter "Kerr Dec."), attached hereto as Appendix D.

Nancy Holson is the lyricist and producer of "The News in Revue," a musical political satire troupe currently performing in Westport, Connecticut. Declaration of Nancy Holson (hereinafter "Holson Dec."), attached hereto as Appendix E.

Michael Huey is the lyricist for "The Fabulous Bakersfield Boys," a musical satire group in Bakersfield, California. Declaration of Michael Huey (hereinafter "Huey Dec.), attached hereto as Appendix F.

The *amici* play or perform topical musical parodies without attempting to secure permission; in each case they have found that securing such permission is difficult or impossible. Strauss Dec., ¶¶ 4-7; Russell Dec., ¶¶ 6-8, ¶¶ 6-8; Hansen Dec., ¶¶ 6; Kerr Dec., ¶ 6; Holson Dec., ¶ 9; Huey Dec., ¶ 9.

The interest of the *amici* in this proceeding is quite clear. If it is unlawful for The 2 Live Crew to sing the song parody "Pretty Woman" except with the permission of the copyright owners of the underlying work, then it may be unlawful for any song parodist to play or perform musical satire or parody, and the world of both political discourse and musical fun may be impoverished. The *amici* are before this Court because the standard used by the Court of Appeals appears to apply with equal force to both political satire and outlaw rap. *Amici* therefore have a strong and direct interest in this Court reversing that ruling.

SUMMARY OF ARGUMENT

To prevent copyright protection of intellectual property from becoming a straitjacket, courts and the Congress have developed the doctrine of "fair use," which provides that copyrighted material may be quoted or copied verbatim under certain conditions. "Fair use" status has regularly been granted to those who quote from copyrighted works to explain or critique them, and to those who parody copyrighted works.

The "fair use" doctrine is now codified at 17 U.S.C. § 107, *amended by* PL 102-492 (1992). The legislative history of Section 107 makes clear that, in adopting that section of the law, Congress believed it was providing fair use protection for parody.

In this case, the Sixth Circuit found that a song parody performed by Petitioners was not a fair use. It reached this determination almost entirely on the basis of its undisputed finding that the parody was recorded in part for a "commercial" purpose. The test applied by the Sixth Circuit effectively rendered the four factor test embodied in the statute moot by holding that the "commercial" nature of the parody was dispositive when considering both the first and fourth tests. This emphasis on "commercial" purpose disregards the statutory language, and renders the statutory balancing test meaningless. The test applied by the Sixth Circuit would bring an end to musical political parody as it has existed since the time of the Revolution, and allow censorship by copyright of protected speech.

Parody and satire play an important role in our culture and are significant elements in the free expression of ideas. It is clear that they constitute a fair use. In applying the four part statutory test to the work at issue, the Court should (1) take into account the socially beneficial use of parody and satire, and (2) require that copyright holders seeking to suppress parodies exhibit proof of actual or potential economic damage.

ARGUMENT

This case presents the Court with a much needed opportunity to clarify a confused area of the law. While a well reasoned line of cases has held that legitimate parody is not a copyright violation because it is a fair use, some courts have reached the opposite decision. Often these rulings involve parodies that are obscene, in poor taste, or, as in the instant case, trenchant statements by controversial performers. The effect of decisions like that issued by the Court of Appeals below has been to allow

an erratic form of censorship by copyright, even where no conceivable economic harm has been suffered.

I. THE UNDERLYING PURPOSE OF THE COPYRIGHT LAW, AND THE SOCIAL VALUE OF SATIRE AND PARODY, WEIGH HEAVILY IN SUPPORT OF ANY CLAIM THAT A SPECIFIC SONG PARODY IS A "FAIR USE."

The purpose of the copyright law is to "promote the Progress of Science and the useful Arts. . . ." U.S. Consituation, Art. I, Sec. 8, Clause 8. To accomplish this end, the Constitution empowers Congress to secure "for limited Times to Authors . . . the exclusive right to their . . . writings." *Id.* In obedience to constitutional mandate, this Court has consistently held that, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the public good." *Twentieth Century Music Corporation v. Aiken,* 422 U.S. 151, 156 (1976) *quoted* in *Sony Corp. of America v. Universal Studios, Inc.,* 464 U.S. 416, 432 (1984).

The concept of "fair use" has been a central element in the law of copyright since at least the early nineteenth century. The first significant embodiement of the principal we now recognize as fair use is found in *Folsom v. March,* 9 F.Cas. 342 (No. 4901) (CC Mass. 1841), where Justice Story upheld both the right of certain authors to copy the works of others and the limit upon that right imposed by the copyright law.[1] Throughout the judicial development of the fair use doctrine, courts

[1] While fair use is generally seen as a limitation on the rights of copyright holders, Justice Story was actually extending the reach of copyright in *Folsom* by undercutting the "fair abridgement doctrine," favored in English law, which allowed almost any abridgement which did not qualify as a complete reprinting. Patterson & Lindberg, *The Nature of Copyright: A Law of Users' Rights* 67 (1991). But even while limiting abridgement from a copyrighted work, the fair use doctrine clearly allowed competitors to use copyrighted materials in competing works. *Id.* at 68.

have focused on whether a purported fair use "substituted" for the original:

> One test which, when applicable, would seem to be decisive, is whether or not so much has been reproduced as will materially reduce the demand for the original.

Hill v. Whalen, 220 F. 359, 360 (S.D.N.Y. 1914).

Fair use is " 'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent'. H. Ball, *Law of Copyright and Literary Property* 260 (1944)." *Harper & Row Publishers v. Nation Enterprises,* 471 U.S. 539, 549 (1985). "The doctrine offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern. . . ." *Meeropol v. Nizer,* 560 F.2d 1061, 1068 (2d Cir. 1977).

The purpose of the doctrine has always been to allow "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend,* 495 U.S. 207, 236 (1990) (*quoting Iowa State University Research Fund v. American Broadcasting Companies,* 621 F.2d 57, 60 (2d Cir. 1980)). The social value of parody and satire, as demonstrated by their continuing importance in American history, together with the near impossibility of securing copyright licenses for satiric and parodic uses, supports a broad application of the fair use doctrine in this field.

A. The Fair Use Defense Is Essential to Parody and Satire.

The fair use defense is essential to artistic creativity in the realms of satire and parody. A satire of a copyrighted work "by its very nature is unlikely to be the subject of a license from the author of a serious work. Only by the recognition of a fair use defense is society likely to reap the benefit of this socially useful literary genre." 3 *Nimmer on Copyright* § 13.05[C] (1992).

This truism is exemplified by the instant case—in which Acuff-Rose declined The 2 Live Crew's offer to pay statutory royalties.

The declarations appended to this brief by *amici* further support this fundamental point. Attempts to secure licenses for parody uses of copyrighted songs almost invariably yield negative results. These include outright refusal,[2] simple failure to respond,[3] conditioning a grant of permission on complete surrender of all rights to the parody lyrics,[4] and even conditioning a grant of permission on use of the music publisher's lyrics rather than the parodist's.[5] While unconditional permission is occasionally granted to a few performers who have established a large commercial market for their parodies, it is often refused even for such performers. Hansen Dec., ¶¶ 6-8.

In short, the Ninth Circuit was correct in its finding that "[p]arodists will seldom get permission from those whose works are parodied." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).[6] Without protection afforded by the fair use doctrine, the writing of musical parody would be dangerous or impossible.

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[2] Russell Dec., ¶ 7; Huey Dec., ¶ 6; Kerr Dec., ¶ 5; Holson Dec., ¶ 6; Strauss Dec. ¶ 6.

[3] Huey Dec., ¶ 6; Holson Dec., ¶ 6.

[4] Huey Dec., ¶ 6; Kerr Dec., ¶ 4.

[5] Holson Dec., ¶ 7.

[6] In the "Mark Russell Comedy Special" which aired on the Public Broadcasting System on the evening of May 19, 1993, Mr. Russell sang a parody of "High Ho, High Ho, It's Off To Work We Go," the theme song of the seven dwarves from the movie "Snow White." In Mr. Russell's hands, the song was transformed into a musical commentary on recent reports that, during the "McCarthy period" of the 1950's, Walt Disney had reported to various federal authorities on the activities of individuals he believed to be subversive. Clearly, there was no possibility of Mr. Russell securing permission for this use of the song from its copyright holder, the Walt Disney Company. Russell Dec., ¶ 5.

B. The American Tradition of Musical Parody and Satire Is Worth Protecting.

The United States enjoys a rich tradition of social and political satire, including satire in musical form. An appreciation of the value of this tradition, in both its historical and current contexts, is critical in considering the application of the fair use doctrine to commercial song parody.

While satire and parody have their roots in ancient times,[7] they have always been at home in English literature. The first English satirical poem was probably Chaucer's "The Rime of Sir Thopas," which mocked chivalric ballads. Later, Alexander Pope cast "The Rape of the Lock" as a parody of epic poetry. The first novel in English, Samuel Richardson's *Pamela*, was published in 1740; the next year saw the publication of Henry Fielding's *Shamela*, whose style, characters, and plot were a direct parody of those in Richardson's novel.[8]

Song parodies are as old as satire itself. The first English song parodies were probably written during the seventeenth century struggles between the Puritans and the Royalists. Oliver Cromwell himself was satirized in "The

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[7] The parody epic poem *Margites* was generally attributed to Homer in antiquity, and was mentioned by Archilochus in the eighth century B.C. *The Oxford Classical Dictionary* 783 (1970). Later satirical authors of antiquity included Aristophanes ("The Frogs;" "Lysistrata"), and the Roman poets Juvenal and Lucian. Juvenal is probably best known for his comment that, in second century Rome at least, it was "difficult not to write satire" (*difficile est saturam non scribere*"). *Satires.* This remark bears a family resemblance to Mark Russell's frequent comment that comedy talent is not needed in Washington—"It's just rip and read."

[8] A portion of the lengthy subtitle of this work shows the intended connection. It begins, "An Apology for the Life of Mrs. Shamela Andrews, in which, the many notorious Falsehoods and Misrepresentations of a Book called Pamela are exposed and Rebutted. . . ." H. Fielding, *Shamela* (1741). *Shamela* was so commercially successful that Fielding followed up the next year with *Joseph Andrews*, another *Pamela* parody. *See generally*, G. Kitchin, *Survey of Burlesques and Parody in English* 169 (1967).

Roundheads and the Cavaliers," whose first line "Nanky Doodle came to town" may have been a remote source of "Yankee Doodle," perhaps the most distinctively American song of all time. V. Lawrence, *Music for Patriots, Politicians, and Presidents* 33 (1975).

A more immediate source of "Yankee Doodle," however, appears to have been an English song called "Lucy Locket" or "Fisher's Jig." The "Yankee Doodle" lyrics may have been written (and the title supplied) by an English army surgeon as a comment on the ragtag character of colonial troops in the French and Indian War. During the Revolutionary War, the words were rewritten, in numerous verses and variations, as an anti-British song. J.T. Howard, *Our American Music: A Comprehensive History from 1620 to the Present* 115 (1965). Other popular song parodies during the American Revolution included "The Liberty Song," penned to the tune of "Heart of Oak" by John Dickinson, later a framer of the Constitution, and "The Battle of the Kegs," by Frances Hopkinson, a signer of the Declaration of Independence.[9] After the Revolution, song parodies continued to be an important form of political expression. In addition to "The Star Spangled Banner," and "America" ("My Country 'tis of Thee"), the most stirring song to emerge from the Civil War, "The Battle Hymn of the Republic," began as a semi-humorous parody of an old southern camp meeting tune.[10]

Song parodies have always been a staple of American political life. They have been used by union organizers and their opponents, war protesters and war supporters, and social critics of all stripes to literally make their

[9] V. Lawrence, *supra*, at 26.

[10] The original song, "Say, Brothers, Will You Meet Us," was written before the war by William Steffe. By 1859, soldiers had begun singing that song with lyrics of their own—the most famous turning the song into "John Brown's Body." Julia Ward Howe heard Union soldiers singing that version, and wrote "The Battle Hymm of the Republic," which became the Union rallying cry for the rest of the war. Howard, *supra*, at 258-59.

voices heard on the issues of the day. Song parodies have important advantages over other forms of political expression. In the words of Joe Hill, the great I.W.W. songwriter and activist, "if a person can put a few cold, common sense facts into a song and dress them up in a cloak of humor to take the dryness off them, he will succeed in reaching a great number of workers who are too unintelligent or too indifferent to read a pamphlet or an editorial on economic science." Letter from Joe Hill to *Solidarity* (Dec. 12, 1914), *cited in* G. Smith, *Joe Hill* 19 (1969). An audio tape prepared by The Capitol Steps containing examples of song parodies through American history has been filed as Exhibit 1 to the Declaration of William Strauss.[11]

The tradition of using song parodies to address national and local political issues has gained renewed vigor in the last few years. For example, Barret Hansen, whose weekly syndicated "Dr. Demento Show" is the leading radio outlet for song parodies in America, received over 100 humorous songs regarding the Persian Gulf War, the vast majority of which were song parodies. Hansen Dec., ¶ 4. In an article discussing the numerous song parodies engendered by the Gulf War, the *Wall Street Journal* called political song parody "a time-honored tradition . . . Americans are the kind of people who appreciate this kind of thing." Wall Street Journal, Sept. 5, 1990 at A14, col. 3. This vibrant American tradition would be weakened or destroyed were this Court to agree with the Sixth Circuit in allowing music publishers to practice censorship by copyright.

C. Congress Intended That Parodies Be Protected as Fair Use When It Enacted Section 107.

When Congress enacted Section 107 in 1976, it expected parody to be covered by the newly codified definition of fair use. Both the House and Senate Reports spe-

[11] Source information on the audio tape (Exhibit 1) is set forth in Exhibit 2 of the Strauss Declaration.

cifically identified parodies as a form of fair use entitled to the protection of the statute. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976) ("House Report"). The Senate Report went so far as to indicate that parodies might be allowed to supplant some uses of the copyrighted original:

> With certain special exceptions (*use in parodies* or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.

S. Rep. No. 473, 94th Cong., 1st Sess. 61 (1975) ("Senate Report") (Emphasis added). The view that fair use should include parody had previously been recommended by the Register of Copyrights. U.S. Register of Copyrights, *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 24 (1961). Congress clearly believed that it was continuing fair use protection for parodies.

II. THE PETITIONERS' SONG "PRETTY WOMAN" IS A FAIR USE OF THE COPYRIGHTED WORK.

The statutory formulation of the fair use test requires consideration of four *nonexclusive* factors. 17 U.S.C. § 107. Both The 2 Live Crew's commercial parody "Pretty Woman" and the social and political satire performed by *amici* are protected by the fair use doctrine.

A. Legitimate Parodists, Such as the Petitioners, Should Prevail on the First Fair Use Factor.

The first of the four fair use factors is:

> (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes. . . .

17 U.S.C. § 107(1).

The majority and the dissent in the Court of Appeals, as well as the District Court, concluded that The 2 Live Crew song "Pretty Woman" was commercial parody.[12]

[12] The majority describes the "purpose" as both parody and commercial. *Acuff-Rose Music, Inc. v. Campbell et al.* 972 F.2d 1429, 1436 (6th Cir. 1992), ("Acuff-Rose II") *cert. granted*, 61 U.S.L.W. 3667 (1993). The dissent finds that the purpose is parody and the character commercial. *Id.* at 1443.

Acuff-Rose Music, Inc. v. Campbell et al., 754 F. Supp. 1150, 1154-55 (M.D. Tenn. 1991) ("Acuff-Rose I"), *rev'd, Acuff-Rose Music, Inc. v. Campbell et al.*, 972 F.2d 1429, 1435-36, 1443 (6th Cir. 1992) ("Acuff-Rose II"), *cert. granted*, 61 U.S.L.W. 3667 (1993). The opinions differ over whether the fact of commercial use is to be treated as dispositive for purposes of the first factor: the majority held that once a commercial use was found, the status of the work as parody was irrelevant;[13] the dissent held that commercial use, *per se*, did not determine whether this fair use factor was present or absent.

1. *The Sixth Circuit Erred in Finding That the Commercial Nature of a Parody Was Dispositive of the First Statutory Fair Use Factor.*

Traditionally, real song parodies, nearly all of which are done in part for a commercial purpose, are accorded no less respect for that reason than hypothetical, non-commercial parodies. Indeed, the cases finding parody to be a fair use *all* involve commercial parodies. *See, e.g.*,

[13] The majority opinion held "that the admittedly commercial nature of the derivative work—the *purpose* of the work being no less important than its *character* in the Act's formulation—requires the conclusion that the first factor weighs against a finding of fair use." *Acuff-Rose II*, 972 F.2d at 1437. The Court reached its decision that this result was "required" without any explanation and after a somewhat rambling statement that it would consider "whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the 'parody does not unfairly diminish the economic value of the original.'" *Id.* A charitable reading of this section of the decision below would conclude that the Court had merged the first and fourth factors, impermissibly importing the economic harm element of the fourth factor into the first factor. As will be discussed *infra*, this error is compounded later in the decision when the Court determined that it could presume potential economic harm without a shred of support in the record. *Id.* at 1438.

Fisher (parody by commercial radio station personality found to be fair use); *Elsmere Music, Inc. v. NBC Company*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (parody by commercial television network found to be fair use); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964) (parody by commercial magazine found to be fair use). These decisions hold that the commercial nature of the parody, by itself, would not act to bar the fair use defense. One need not go so far as Dr. Johnson, who pithily stated that "No man but a blockhead ever wrote except for money," [14] to recognize that meaningful comment, whether satire, criticism or review, is generally undertaken in part for financial gain.

Today, scores of companies, groups, and individuals write, perform, and record political parody songs of copyrighted material, relying on the fair use doctrine for their protection from claims of copyright infringement. *See* Petition at 20. Whenever the song gains more than a purely local audience, these parodies are presented in part for commercial purposes. They are played on commercial radio stations, broadcast on commercial television networks, performed at concerts for which admission is charged, or recorded on tapes or discs which are sold to the public. There is simply no other route into the popular culture than through the marketplace; even were the parodists themselves to perform the work *gratis*, the act of transmitting this source of political discourse to the public is necessarily suffused with commercialism. Hansen Dec., ¶ 8; Holson Dec., ¶ 2.

Of course, this is not a new phenomenon. Parodists, like other writers and artists, have always engaged in their art in part for monetary reward. As one commentator has noted:

> It is obvious that the vast majority of authors combine both commercial and artistic motives in all their works. An author naturally wants to support himself and to convey his message, and to accomplish both

[14] J. Boswell, Life of Johnson 731 (1970).

> it is in his interest to sell as many copies or tickets as possible. . . . It was only the prospect of ameliorating his oppressive poverty that prompted Cervantes to begin writing *Don Quixote*. Henry Fielding wrote *Shamela* and *Joseph Andrews* in a desperate attempt to support his family after the Licensing Act of 1737 cut off his income by closing down his theater.

Goetsch, *supra*, at 44.

American song parodists have never shied away from receiving payment for their work. In 1798, the parody "Adams and Liberty," written to the tune of "To Anacreon in Heaven," paid its author a reported $750. Howard, *supra*, at 126. The sheet music for this song is believed to have been the first publication in America of the tune of our future national anthem. V. Lawrence, *supra*, at 148. One of the first successful American musicals was "The Tars from Tripoly," about American sailors fighting the Barbary Pirates. The entire show was adapted from an English ballad opera glorifying the Royal Navy. *Id.* at 183.

However phrased, the Sixth Circuit has established what amounts to a bright line test—if a parody is produced for a commercial purpose, it is not a fair use. The Court finds that commercial parody must fail the first test because its commercial purpose outweighs its status as parody; moreover, because the parody is commercial, economic harm must be presumed, thereby causing the work to fail the fourth test.[15] This result is totally inconsistent with the language and intent of the statute. Had Congress intended the result reached by the majority, it could have simply written the first factor as "whether such use is of commercial nature." It did not do so.

In formulating the statutory fair use doctrine contained in 17 U.S.C. § 107, Congress was subject to intense

[15] The Sixth Circuit has also cast the second and third factors in such a way that song parodies will always fail these tests. *See, infra*, at section B and C.

lobbying on the degree to which a schoolteacher could copy portions of a book for use by her class. House Report at 66. The dependent clause referencing the commercial or non-profit nature of a use was added largely to expand "fair use" to this area, not to limit the scope of fair use treatment:

> The Committee has amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.

Id.

In deciding to afford controlling weight to the commercial character of a parody, the majority opinion relied heavily on *Harper & Row*. Yet nothing in that decision compels, or even suggests, that the commercial character of a contested fair use should be controlling in an analysis of the first factor. The Court weighed three factors in *Harper & Row* to determine the nature and character of the challenged use: the fact that the challenged use entailed news reporting; the fact that *The Nation* was a commercial magazine; and the fact that it had "the *intended purpose* of supplanting the copyright holder's valuable right of first publication." *Id.* at 562. (Emphasis in original.) It was clearly this last fact, and not the second, which tilted this Court's decision on the first fair use factor toward Harper & Row: "In evaluating character and purpose we cannot ignore *The Nation's* stated purpose of scooping the forthcoming hardcover and *Time* abstracts." *Id.* By contrast, in this case, no such intention to supplant or "scoop" the original melody of "Oh, Pretty Woman" has been found on the record of this case, or has even been alleged.

2. *In Evaluating the First Statutory Factor, Weight Should Be Given to the Importance of Parody and Satire as a Means of Comment and Criticism.*

It is clear from the case law and the legislative history that parody is an accepted fair use. Even the majority opinion below recognized that "the term parody must be either subsumed within the statutory terms 'criticism' or 'comment,' or be an entirely separate category of exception." *Acuff-Rose II*, 972 F.2d at 1435. The Second Circuit has held that this fact alone means that the defendant wins on the first statutory test:

> [T]here is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in section 107. " '[I]f a book falls into one of these categories [i.e., criticism, scholarship or research], assessment of the first fair use factor should be at an end,' " (citation omitted) even though, as will often be the case, the biographer and publisher " 'anticipate profits.' " (citation omitted).

Wright v. Warner Books, Inc., 953 F.2d 731, 736-37 (2d Cir. 1991). This view has been implicitly adopted by most courts which have examined song parody.

In *Berlin*, the court rejected Irving Berlin's contention that *Mad Magazine* had infringed his copyright to various song lyrics.[16] The court expressly rejected the plaintiff's contention that *Mad's* use of his song lyrics was unfair

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[16] There are no reported cases prior to the twentieth century in which a copyright holder attempted to enjoin a satire of any type of work, or to sue for royalties from such a satire. The early twentieth century cases which are frequently cited on this subject, such as *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903), did not involve song parodies such as the one at issue here. In those early cases, vaudeville performers simply sang a copyrighted song while imitating the movements, voice, and attitude of a well kown performer. If one sets aside the vaudeville cases like *Bloom*; *Green v. Luby*, 177 F. 278 (C.C.S.D.N.Y. 1909); and *Green v. Mitsenheimer*, 177 F. 286 (C.C.S.D.N.Y. 1909), *Berlin* marks the first recorded case of which *amici* were aware in which a song parodist was sued for copyright infringement.

because *Mad* was a commercial magazine, holding that "as a general proposition, we believe that parody and satire are deserving of substantial freedom. . ." *Id.* at 545.

In *Elsmere Music, Inc. v. NBC Company,* the court protected as a fair use a Saturday Night Live parody of the "I Love New York" advertising jingle. The Second Circuit held that "in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody. . . ." 623 F.2d at 253.

In *Fisher,* the court held that a parody of "When Sunny Gets Blue" by a disc jockey on a commercial radio station was a fair use. In this case, the parties agreed that the parody was a "commercial use of the song." 794 F.2d at 437. The court recognized, however, that "many parodies distributed commercially may be 'more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work.'" *Id., quoting Pillsbury Co. v. Milky Way Productions, Inc.,* 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

Warner Brothers, Inc. v. ABC, Inc., 720 F.2d 231 (2d Cir. 1983), a non-musical parody case, affirmed a grant of summary judgment for the defendants in a case involving the alleged infringement of Warner's "Superman" copyrights by the television program, "The Greatest American Hero." The court contrasted the fair use of elements of the Superman persona in the television program with a previous infringing use of similar elements in a commercial for television sets and stereos. In doing so, it explained the importance of parody in terms directly applicable to this case:

> [A]n original work of authorship with elements of parody, though undoubtedly created in the hope of commercial success, stands on a different footing from the products of a discount chain. . . . After all, any work of sufficient notoriety to be the object of parody has already secured for its proprietor considerable financial benefit. According that proprietor further protection against parody does little to promote creativity, but it places a substantial inhibition upon the creativity of authors adept at using parody to entertain, inform, or stir public consciousness.

Id. at 242-43.

Musical parody and satire have provided the American people with a voice for their political sentiments—frequently a voice that had no other way to be heard. When the values associated with parody are weighed, particularly in the context of the congressional intent that parodies should qualify for fair use protection, this Court should reach the conclusion that "Pretty Woman" prevails on the first use factor, as do all legitimate parodies.

B. Creative Parodies, Such as the Petitioners' Work, Should Prevail on the Second Fair Use Factor When They Parody a Published Work.

The second fair use factor is:

> "(2) the nature of the copyrighted work. . ."

17 U.S.C. § 107(2).

In evaluating this factor, the *Harper & Row* Court said that the deference accorded an unpublished work is greater than that accorded a published work, and that the deference accorded creative works is greater than that accorded works of fact or reportage. 471 U.S. at 562. The opinion below addresses only the second of these propositions. The dissent gives consideration to both, and rightly concludes that the mere fact that the copyrighted work being parodied is "creative" can never be controlling in the case of a parody, because "it would make no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for parodists' mills for the last two and a half millennia." *Acuff-Rose II,* 972 F.2d at 1444. When, as here, a parody takes for its subject a recognizable, previously published work, it should prevail on this factor.

C. The Sixth Circuit Misapplied the Substantiality Test as It Pertains to Song Parodies.

The third statutory factor is:

> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole. . . .

17 U.S.C. § 107(3).

The use of this statutory factor in the case of parody is, as the dissent has recognized, "problematical." *Acuff-Rose II*, 972 F.2d at 1444. A parody by its nature must, at a minimum, "conjure up" a sufficient portion of the copyrighted work to be recognizable as parody.

In the specific case of song parodies, the Second Circuit has endorsed a view of the "substantiality" factor which differs markedly from the restrictive view of the majority opinion in this case:

> [T]he concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. (Citation omitted.) A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect.

Elsmere, 623 F.2d at 253 n.1. Similarly, the Ninth Circuit has recognized a "special need for accuracy" in song parodies where a change of a few notes can make the melody unrecognizable, and destroy the intended musical joke. *Fisher*, 794 F.2d at 439.

The Sixth Circuit opinion simply makes no sense when applied to a song parody. Despite recognition of *Elsmere*, it finds that:

> The qualitative degree of the copying is even more critical than the quantitative, and we ask what degree of the essence of the original is copied in relation to its whole. (Citation omitted.) We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original.

Acuff-Rose II, 972 F.2d at 1438.

The flaw in this formulation is that every song has a recognizable tune. That tune constitutes its true "heart" or "essence." It is impossible to parody the song without musically quoting its tune. According to the majority opinion, once one does quote this "heart," one loses (or at least does not win) on this factor of the fair use test.

The genre of song parody, as practiced by Petitioners and the *amici*, consists largely of setting original lyrics to familiar tunes. Focusing on musical similarity ignores the creative heart of parody—the original lyrics created by the parodist and the "spin" which those lyrics place on the original song. If an existing work is not parodied directly, but is used as a vehicle for political or social satire, then the copyrighted material should contribute effectively to the satire.[17] When the copyrighted material is an effective part of the parody, the parodist should prevail on this test.

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[17] For example, The Capitol Steps song "I Wanna Be Your Pander Bear" is a satirical comment on campaign promises. But it was set to the music of "Teddy Bear," an old Elvis Presley song. Since President Clinton, the target of the song, has sometimes borne the nickname "Elvis," this selection adds a musical joke to the political lyrics. In the same vein, the song "Phantom of the Clarion" by the Fabulous Bakersfield Boys is a comment on the waste of building a huge uncompleted hotel. Huey Dec., ¶ 7. The use of the tune "Phantom of the Opera" musically evokes the underground chambers which were the setting of much of that play, and compares them to the interior of the unfinished hotel. Similarly, "The News in Revue" parodied the song "We'll Always be Bosom Buddies" to satirize the political backstabbing which occurred between Liz Holtzman and Geraldine Ferraro in the New York Senate primary during "The Year of the Woman." Holson Dec., ¶ 3. In each case, the parodist used the entire tune and meter of the original song, as well as scattered words, to make a devastating and original satiric point.

D. The Fourth Statutory Fair Use Factor Requires Proof That a Commercial Parody Will Harm the Copyrighted Work.

The fourth statutory factor is:

> (4) the effect of the use upon the potential market for or the value of the copyrighted work.

17 U.S.C. § 107(4).

This Court has called this fourth factor "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. The Sixth Circuit's holding that copyright holders win on this factor whenever a parody is "commercial" is the core error of its opinion.

1. *The Sixth Circuit Erroneously Substituted a Commercial Use Presumption for Proof of Economic Harm.*

Despite the importance of the fourth factor, the copyright holders in this case presented no evidence that the petitioners' parody had any effect on the market for its copyrighted work.[18] But the court below determined that there was no need for evidence. Having found that The 2 Live Crew's use of the copyrighted work was "wholly commercial," the Court "presume[d] that a likelihood of future harm to Acuff-Rose exists." *Acuff-Rose II*, 972 F.2d at 1438.

In reaching this rather startling presumption, the majority opinion relied upon *Harper & Row*. However, an evidentiary presumption, such as that announced by this Court in *Harper & Row*, has only a limited effect. Under Fed. R. Evid. 301, "a presumption imposes on the party

[18] On the other hand, The 2 Live Crew presented evidence that their parody did not constitute either a present or future danger to record sales of "Oh, Pretty Woman." Petitioners made this showing through the unrebutted affidavits of Oscar Brand and M. William Krasilovsky, which are attached as Appendices to the Petition. Both experts testified that the potential customers for The 2 Live Crew parody and the original Acuff-Rose song are entirely different and distinct.

against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial on the party on whom it was originally cast." Thus, the federal courts, through Rule 301, have adopted the "bursting bubble" approach to presumptions, under which the presumption vanishes, and has no further probative effect, once it has been rebutted. 10 J. Moore & H. Bendix, *Moore's Federal Practice* § 301.04[4.-1] (2d ed. 1988); *Reeves v. General Foods Corp.*, 682 F.2d 515, 522 n.10 (5th Cir. 1982); *Legille v. Dann*, 544 F.2d 1, 6-7 (D.C. Cir. 1976); *In re The Yoder Company*, 758 F.2d 1114, 1119-20 (6th Cir. 1985). In this case, the presumption had been rebutted by Petitioners' uncontradicted affidavits. This factor should therefore have been decided in Petitioners' favor.

In focusing on scraps of precatory language from *Sony* and *Harper & Row*, the Court of Appeals ignored the analysis which was actually performed by this Court in both of those cases. This Court found the "commercial use" presumption to be rebuttable in *Sony*, the very case in which it created the "commercial use" presumption. Notwithstanding the statement relied upon by the court below that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege which belongs to the owners of the copyright," *Sony*, 464 U.S. at 451, this Court held that the "commercial use" presumption had been rebutted through evidence showing that the *Sony* respondents' commercial video technology had fair and legitimate uses. In *Harper & Row*, the Court found no need to base its holding with respect to the fourth test on presumed damage: "Rarely will a case of copyright infringement present such clear-cut evidence of actual damage." *Harper & Row*, 471 U.S. at 567.[19] The "commercial use" presumption of *Sony* and

[19] The Court further noted that, in direct contradiction to this case, "the trial court found not merely a potential but an actual effect on the market." *Id.*

Harper & Row was not intended to, nor did it, overrule *sotto voce* the traditional fair use protection afforded commercial song parodies.

The Court of Appeals reversed the District Court on the fourth statutory test despite the absence of any evidence of actual or potential commercial harm. This effectively created an irrebuttable presumption that commercial use must always result in injury to the market for the copyrighted work.[20] By focusing on the commercial aspect of Petitioner's work, the court below collapsed the first and fourth factors, replacing them with a *per se* test of commercial benefit.

The lower court's holding that it would presume harm to the copyright holder as the result of a commercial parody, then find for the copyright holder on the basis of that presumed harm, is inconsistent with the legislative history of the copyright statute. The Senate Report accompanying the bill which became the Copyright Act of 1976 concluded just the opposite—that even if it could be demonstrated that a parody had supplanted a part of the normal market for the copyrighted work, the parody would not necessarily be construed as an infringement. Senate Report at 61.

The idea that a parodist or satirist rather than the copyright holder should have the burden of showing that commercial injury did not result from a parody or satire is

[20] In fact, the other case principally relied upon by the majority below, *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992), reached a contrary conclusion. In that case, the Second Circuit expressly recognized that the nature of the intended audience of even a direct copy of a work could require that it be treated as a fair use. According to the Court, "fair use permits lyrics or music to be copied in a literary magazine, but where the same material is published in a song sheet magazine, purchased for playing and not simply for reading, it is an unfair use." 960 F.2d at 312. This distinction is similar to the conclusion reached by the Petitioners' expert, Oscar Brand, who concluded that The 2 Live Crew's parody was intended for an entirely different audience than the original work, and could not "affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Petition App. D, ¶ 19.

completely at odds with the realities of the music and publishing industries. It is the copyright holder or publisher who has direct access to sales records and reports of royalty revenues. If economic harm in fact has resulted from a satire or parody, it could only be demonstrable from those figures. It would be a double burden on the parodist to require him or her to first obtain the relevant data from the copyright holder through discovery, and then to mount an affirmative case of "no harm" on the basis of whatever data can be obtained through that process.

2. *The Presumption Employed by the Sixth Circuit Will Have a Chilling Effect on Protected Speech.*

A presumption such as that erected by the majority below raises grave constitutional doubts when applied to important forms of political and social expression such as parody and satire.[21] As this Court held in *Speiser v. Randall*, 357 U.S. 513, 526, presumptions which shift the burden of proof to an individual whose speech is claimed to be unlawful are constitutionally suspect:

> [W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the law-

[21] Courts have sometimes held that the First Amendment offers no protection to copyright infringement, because the copyright laws protect only the expression of an idea, and not the idea itself. *See, e.g., Sid & Marty Krofftt Television v. McDonald's Corp.*, 562 F.2d 1157, 1169-71 (9th Cir. 1977). However, at least one commentator has taken vigorous exception to this result where parody directly mocks or criticizes a copyrighted work. C. Goetsch, "Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection," 3 *W. New England Law Review* 39 (1980). Courts have also found that the fair use doctrine contains a public policy component with distinct First Amendment overtones. *See, e.g., Berlin*; *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); and *Keep Thompson Governor Comm. v. Citizens For Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978).

> fulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position. . . . "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

The rule enunciated in *Speiser* has also been applied by this Court in litigation between private parties where that litigation impinged on First Amendment values. Most notably, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), this Court relied on *Speiser* in holding that a state libel law which placed on critics of public officials the burden of showing their statements to be true was unconstitutional. *See also Freedman v. Maryland*, 380 U.S. 51 (1965) (burden of showing obscenity must rest with the censor). Thus, in a wide variety of arenas, presumptions which shift the burden of proof to a speaker, artist, or writer have been disapproved by this Court. The idea/expression dichotomy ordinarily employed to separate copyright decisions from First Amendment concerns provides no logical basis for reaching a different conclusion in setting fair use standards for parody and satire.

This Court should recall its perceptive observation in *Sony* that "[w]hile the law has never recognized an author's right to absolute control of his work, the natural tendency of legal rights to express themselves in absolute terms to the exclusion of all else is particularly pronounced in the history of the constitutionally sanctioned monopolies of the copyright and the patent." 464 U.S. at 432 n.13. For this reason, it is important that the Court announce, in the strongest terms, the rights of the parodist; otherwise, those who practice parody and satire will inherit a legacy of litigation and cost:

> There is no constitutional restraint on the copyright owners as to either their proprietary interpretation or their power to sue alleged infringers who disagree with their interpretation. The binding interpretation of copyright is thus up to the courts. That interpretation should be made not only in terms of the wording of the statute, but also in light of the free speech clause.

Patterson & Lindberg, *supra*, at 133.

3. *The Argument That a Parody Interferes With the Right of a Copyright Owner To Profit From Its Own Parodies Is Without Merit.*

A crucial link in the reasoning of the Sixth Circuit that a parody must always cause economic harm to a copyright owner was its holding that The 2 Live Crew parody would impair the market for parodies by the copyright holder. Its reasoning on this issue was 1) copyright owners have rights in derivative works as well as the original work; and 2) parodies are derivative works; therefore 3) copyright owners have rights in parodies of their own work which will be injured by the issuance of unlicensed parodies. *Acuff-Rose II*, 972 F.2d at 1439.

However, the second element of this syllogism is false; parodies are, under section 107, not derivative works, but rather "comment" and "criticism" on a work. The weakness in the Court's reasoning can be seen if one substitutes musical or theatrical criticism for parody. Assume that the *New York Times* writes a criticism of a copyrighted play. Clearly, this criticism is prepared and published for commercial purposes, *i.e.*, to sell newspapers and newspaper advertising. Could it then be said that the *Times* review was a copyright infringement because it unfairly interfered with the author's right to criticize his own work? This would truly be a remarkable result; yet it seems to be the result mandated by the majority's opinion. Needless to say, few if any of the great parodies of the past would ever have been written had the copyright holder of the original been the only person empowered to write them.

Of course, a different issue would arise if a reviewer or parodist simply intended to appropriate the original work. *Harper & Row*, 471 U.S. at 550. But this issue does not arise here, since the majority opinion of the court below has already determined The 2 Live Crew's intent to be parody, not piracy. *Acuff-Rose II*, 972 F.2d at 1435.

4. *A Failure To Base Infringement Decisions on Proof of Economic Harm Will Lead to Regulation of Parody Based on the Popularity and Political Acceptability of the Parodist.*

The fair use test enacted by Congress necessarily places this Court in the position of formulating specific fair use rules through a balancing of competing values. Even more than other courts which have considered the issue, the Sixth Circuit has tipped the balance too far in the direction of the copyright holder and against the free flow of comment and ideas. This Court should announce a test which restores that balance.

Proponents of the view that commercial parody is not protected as a fair use should take little comfort in the case law cited in support of that view. These cases lack any meaningful intellectual underpinning; on analysis, the only principal which can be gleaned from them is that unpopular, pornographic, tasteless or underfunded parodists may lose infringement suits, particularly if, as in this case, they have the misfortune to be sued in the hometown of the copyright holder.

The arbitrariness with which these decisions have been made can best be seen by contrasting *Loew's, Inc. v. Columbia Broadcasting System, Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom., Benny v. Loew's*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom., Columbia Broadcasting System Inc. v. Loew's*, 356 U.S. 43 (1958) (*affirmed per curiam* by an equally divided Court) (questioning whether there was any viability to parody defense to copyright infringement)[22] with the decision reached

[22] At the Circuit Court level, the decision in *Loew's* was upheld in part on the following rationale: "up to the time of the present

by the same District Court only months later in *Columbia Pictures Corporation v. NBC*, 137 F.Supp. 348 (S.D. Cal. 1955) (upholding a Sid Caesar burlesque of "From Here to Eternity" as a fair use). Unfortunately, in clearly retreating from his earlier decision in *Loew's*, Judge Carter chose to couch the distinction in terms of the fact that Sid Caesar only "conjured up" an appropriate amount in his parody, unlike Jack Benny, who presumably "over-conjured." This inserted into the law of fair use an extraordinarily subjective element which, unsurprisingly, has often been used to strike down parodies which fall outside the mainstream.

When the Ninth Circuit next addressed this issue in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 US. 1132 (1979) it backed away from much of the substance of *Benny*,[23] but still found itself engaged in a murky examination of how much is too much. Faced with a comic book parody in which characters resembling Mickey Mouse and his compatriots were committing sexual acts, the Court engaged in an examination of how accurate the likenesses were and what level of caricature crossed the line of fair use.

Pornographic parody was again central to two decisions denying fair use status to a parody in the Second Circuit. In *Walt Disney Productions v. Mature Pictures*

controversy, no federal court in any adjudication, has supposed that there was a doctrine of fair use applicable to copying the substance of a dramatic work and presenting it, with a few variations, as a burlesque." *Benny v. Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956).

[23] The Court's treatment of *Benny* hardly stands as a ringing affirmation of that decision: "The language in *Benny* concerning the substantiality of copying can be given a reading much more in keeping with the context of that case and the established principals at the time of that case if the opinion is understood as setting a threshold that eliminates from the fair use defense copying that is virtually complete or almost verbatim." *Air Pirates*, 581 F.2d at 756. "Thus *Benny* should stand only as a threshold test that eliminates near verbatim copying." *Id.* at 758.

Corporation, the use of portions of the Mickey Mouse March in a film entitled "The Life and Times of the Happy Hooker" was found to be an infringement on the grounds that "defendants used the song over and over again for substantially more time than is required to 'conjure up the original.'" 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975). In *MCA, Inc. v. Wilson*, 672 F.2d 180, 185 (2nd Cir. 1981), the Court confronted a sexually oriented take-off on the song "Boogie Woogie Bugle Boy of Company B" by stating:

> We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society.

As Judge Mansfield's powerful dissent points out, that decision was reached by trampling the standards previously set by the Second Circuit in *Berlin* and *Elsmere* solely because of the content of the parody:

> We cannot, under the guise of deciding a copyright issue, act as a board of censors, outlawing X-rated performances. Obscenity or pornography play no part in this case. Moreover, permissible parody, whether or not in good taste, is the price an artist pays for success, just as a public citizen must tolerate more personal attack than the average private citizen.

Id. at 191.

In summary, a consideration of the statutory factors with an eye to the nature of parody leads inexorably to the conclusion that the parody in question was a fair use. The Sixth Circuit's contrary conclusion is unsupportable on this record.

CONCLUSION

The 2 Live Crew and the *amici* purvey strikingly different versions of satire and parody. But legal interpretations aimed at unconventional or peripheral behavior must be evaluated in light of their potential impact on

speech which is at the heart of protected political discourse. However offensive the lyrics of "Pretty Woman" may strike some, it is not possible to subject them to censorship by copyright without imperiling a vibrant source of political speech which has flourished since the founding of the Republic.

Today, when political disputes frequently lead to short tempers and frayed nerves, political song parodists continue to serve the same purpose which historian Vera Brodsky Lawrence ascribed to them during the Civil War:

> People on both sides of the battle lines placed great reliance on the songs, finding in them a source of strength, courage, hope, much-needed laughter, and a general escape valve for the unbearable tensions of their lives. . . .

Lawrence, *supra*, at 341.

The Sixth Circuit has fashioned an interpretation of fair use, based almost entirely on the admitted fact that Petitioners are in the business of selling their record albums, that completely overturns the traditional protection afforded satire and parody. This crabbed interpretation of fair use disregards other critical values which Congress intended to be weighed.

Withdrawing protection for commercial parody and satire eviscerates fair use. This Court should reverse the lower court decision, and thereby affirm the historic role of these art forms in vitalizing political, social, and cultural discourse.

Respectfully submitted,

WILLIAM C. LANE *
DAVID CHARLES MASSELLI
TRACY ANN ROMAN
MASSELLI & LANE, P.C.
8260 Greenboro Drive
Suite 260
McLean, Virginia 22102
(703) 556-9550
Counsel for Capitol Steps Productions, Inc., Mark Russell, Barret E. Hansen, Bruce W. Kerr, Nancy Holson, and Michael R. Huey

Dated: May 28, 1993

* Counsel of Record

APPENDICES

APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF WILLIAM A. STRAUSS

1. My name is William A. Strauss. I am a Vice President and Director of Capitol Steps Productions, Inc., a Virginia corporation, and the paid, full time artistic director and co-lyricist for "The Capitol Steps," the company's musical and theatrical troupe. I have been with the troupe since its inception at a Christmas party on Capitol Hill, and have been a director and officer of the corporation since its formation. I am also an attorney and a member of the Bar of the District of Columbia.

2. The Capitol Steps have been performing in the Washington, D.C. area and nationally for eleven years. The group regularly performs on national network radio and television, including on such shows as "Nightline" and "Good Morning America," and at live shows around the country. The Capitol Steps produce and sell recordings of their songs and live performances. The group has performed for, and at the invitation of President Reagan

and President Bush (five times). We have also performed for President Clinton, for judicial conferences, and for probably three quarters of all current Members of Congress, none of whom have ever expressed to me the opinion that we were in violation of the copyright law. Both President and Mrs. Bush, many Members of Congress, and various Cabinet members have appeared on stage with us in our performances.

3. A Capitol Steps performance consists primarily of song parodies of copyrighted songs. The parodies, which generally have a high current political content, range in length from a few bars to an entire parody rendition. Recent examples are "I Wanna Be Your Pander Bear," to the tune of "Teddy Bear," a satirical jab at President Clinton; "Why Not Take Al and Me," to the tune of "Why Not Take All of Me," an often-updated barb at the Clintons and Gores; and "Day Care," to the tune of "Day-O," a look at the difficulties faced by President Clinton's nominees for Attorney General. Government officials have frequently brought visiting foreign officials to the Steps' shows as a jovial way of demonstrating the role of free speech in the American political process; Capitol Steps songs have also been broadcast on the Voice of America.

4. Our performances are a continuation of a long American tradition of musical parody. I have caused to be lodged with the Clerk of this Court, as Exhibit 1 to this declaration, a recording produced by The Capitol Steps entitled "From Yankee Doodle to Pander Bear: A History of American Musical Parody." The recording contains excerpts from 66 of our nation's most memorable and historically significant musical parodies. We produced the tape as a tribute to those who wrote and sang these songs, and as a teaching aid for teachers of American history in secondary schools and colleges. Exhibit 2 to this declaration is a list showing source material from which the songs heard on the tape and information regarding them were drawn.

5. The Capitol Steps do not seek or obtain licenses from copyright owners for two reasons. First, we have been advised by counsel that our songs constitute a "fair use" of the copyrighted material we use, and for which we give full, album-jacket credit to the original authors and composers. See the album notes to our twelfth and most recent album, "The Joy of Sax," submitted as Exhibit 3 to this declaration. Second, we have found that, in the business of social or political satire, obtaining permissions from song publishers is, for all practical purposes, impossible.

6. On one occasion, the producers of a network television show, against our advice, tried to get publisher permission to perform seven of our songs. After much time and discussion, permission was denied in six of the seven cases.

7. Asking permission for such uses is interpreted by music publishers as seeking their endorsement of the political ideas contained in our lyrics. Many copyrights are controlled by large corporations, such as Sony or Walt Disney, which have ongoing issues and relationships in Washington. These companies have no interest in endorsing barbed political satire directed at Members of Congress, the President, or even the federal judiciary. Nor do we wish to submit our lyrics to them for censorship. On the other hand, if we do not seek or obtain permission, then the ideas and lyrics of our songs—good or bad—are solely ours. And prior to the issuance of the *Acuff-Rose* decision by the Sixth Circuit Court of Appeals, no one had ever sued us for copyright infringement.

8. In our experience, song parodies cause no real or discernable harm to song publishers. People who book Capitol Steps shows, sit in our audiences, or buy our albums and tapes are interested in political satire, not in listening to melodies. Similarly, it is impossible for me to imagine someone who would be dissuaded from buying the original version of "Oh, Pretty Woman" because he already owned The 2 Live Crew's parody of that song.

9. Finally, the very nature of social and political satire makes it impossible to obtain timely permission. The Capitol Steps perform up-to-the-minute political satire based on current political events; the process of asking for and receiving permission would make it impossible for us to perform the kind of current repertoire which our audiences have come to expect.

10. I have carefully read the opinion issued by the Sixth Circuit Court of Appeals in this action. I am fearful that this opinion, unless reconsidered, would energize those who for whatever reason—including distaste for controversial ideas and opinions—may wish to quash song parodies as a popular form of political expression. Attached as Exhibit 4 to this declaration is a letter I received this month from Linda Santiago, Director, Copyright Administration for EMI Music Publishing, a British company that has become one of the largest copyright holders of American songs. The letter alleges that, simply because we sell our records, CDs, and tapes, our parody of songs such as "If I Only Had a Brain," from *The Wizard of Oz* is not a fair use. I believe that this letter may well represent the first tangible effect on The Capitol Steps of the Court of Appeals decision in *Acuff-Rose*.

I make the foregoing declaration under penalty of perjury this 26 day of May, 1993.

/s/ William A. Strauss
WILLIAM A. STRAUSS

EXHIBIT 2

Source Information for Song Parodies on Audio Tape—
"From Yankee Doodle to Pander Bear:
A History of American Musical Parody"

"American Spirit," "Jeffersonian's Song," and nonsense stanza, parodies of "Yankee Doodle"

I. Silber, *Songs America Voted By* 22, 25 (1971).
V. Lawrence, *Music for Patriots, Politicians, and Presidents* 33 (1975).
See also S. Foster Damon, *Yankee Doodle* (1959), a book devoted entirely to "Yankee Doodle."

Untitled parody ("Squish Into the Deep. . .") of "Hosier's Ghost"

Lawrence, *supra,* at 45.

"Liberty Song" and its untitled Tory parody ("Such Villains. . ."), both parodies of "Heart of Oak"

Id. at 26, 30.

Untitled parody ("In Bedlam Lofty. . .") of "The British Grenadiers

Id. at 36.

"American Parody" of "Rule Britannia"

Id. at 50.

"The Battle of the Kegs" parody of "Maggy Lauder"

Id. at 77.

"To Genet in New York" parody of "The Anacreontic Song"

Id. at 129.
See also Filby and E.G. Howard, *Star Spangled Books* (1972), about the "Star Spangled Banner."

"My Country 'tis of Thee," and "Rights of Woman," parodies of "Sally in Our Alley"

J. T. Howard, *Our American Music* 127 (1965).
Lawrence, *supra,* at 130, 262-63.

Untitled parody ("Those Hardy Knaves. . .") of "Nancy Dawson"
Lawrence, *supra,* at 75.

"Tip and Ty" parody of "Little Pig's Tail"
Id. at 268-69.

"The Log Cabin and Hard Cider Candidate," and "Bullet Proof," parodies of "Auld Lang Syne"
Silber, *supra,* at 40, 42.
For a general history/collection of song parodies from the 1840 campaign, see Lawrence, *supra,* at 265-99.

Untitled Whig parody ("Old Tip He Wears. . .") of "Yankee Doodle"
Id. at 282.

"Two Dollars a Day and Roast Beef" parody of "Rosin the Beau"
Silber, *supra,* at 52.

"Old Zack Upon the Track" parody of "Old Dan Tucker"
Id. at 57.
For general information on Steven Foster, see also Howard, *supra,* at 184-98.

"Democratic Song" parody of "Oh! Suzannah"
Silber, *supra,* at 65-66.

"Lincoln and Hamlin" parody of "Wait for the Wagon"
Id. at 82.

"A New Yankee Doodle" parody of "Yankee Doodle"
Republican Campaign Songster for 1864 15 (1864).

"Union Dixie" parody of "Dixie"
Silber, *supra,* at 85.
For information about Abraham Lincoln, see Lawrence, *supra,* at 427.

"John Brown's Body," "Battle Hymn of the Republic," and "White Soldier's Song," all parodies of "Say, Brothers, Will You Meet Us?"

Lawrence, *supra,* at 357, 362-63.
Silber, *supra,* at 87-88.
Howard, *supra,* at 258.

"Wide-Awake Yankee Doodle" parody of "Yankee Doodle"
Silber, *supra,* at 75.

"Good-By! Andy!" parody of "Jim Crack Corn"
Lawrence, *supra,* at 449.

Untitled ("Oh! Hearken to the glorious news. . .") and "When the Johnnies Get Into Power," parodies of "When Johnny Comes Marching Home Again"
Silber, *supra,* at 99, 116-17.

"His Grandfather's Hat" parody of "Grandfather's Clock"
Id. at 145.

"Now I am the Leader of the Democracee" parody of "When I Was A Lad"
Id. at 119-20.

"Grover's Veto," and "The White House Tom-tit" parodies of "Tit Willow"
Id. at 138, 182.

"Bryan Walked off with the Coveted Prize" parody of "The Band Played On"
Republican Campaign Parodies and Songs 5 (1896).

"A New National Anthem" parody of "America"
Silber, *supra,* at 154.

"Sing a Song of Labor" parody of "Sing a Song of Sixpence"
Republican Campaign Parodies and Songs 5 (1896).

Colorado Republican parody of "Oh, Dear, What Can the Matter Be?"
Silber, *supra,* at 163.

Untitled parody ("I Had a Job Once. . .") of "Ta-ra-ra Boom-de-ay"
B. Stavis, *et al., Songs of Joe Hill* 22 (1960).

"We Will Sing One Song" parody of "My Old Kentucky Home"
Id. at 24.

"We're All So Glad to Breathe the Air Again" parody of "When Johnny Comes Marching Home Again"
A Collection of Republican Parodies (1920).

"Eight Long Years of the Democrat Mule" parody of "The Erie Canal"
Library of Congress, Harding/Hobart Campaign Folder (1920).

"Kansas Suffrage Song" parody of "Old Dan Tucker"
Silber, *supra,* at 228.

"Keep Woman in Her Sphere" parody of "Auld Lang Syne"
I. Silber, "A Brief History of the Woman's Suffrage Movement" *Folkways Records, Album No. FH 5281* (1958), at 4.

"Kiss Yourself Goodbye!" parody of "Coming Through The Rye"
Silber, *Songs America Voted By* 259 (1971).

"That's Why We're Voting for Roosevelt" parody of "Marching Through Georgia"
Id. at 266.
See also, T. O'Dowd, *1936 Franklin Roosevelt Song Book* (1936).

"Landon, Oh, Landon" parody of "Oh! Suzannah"
Silber, *supra,* at 262-63.
Also, for a description of Hearst's parody writing contest, *see id.* at 263.

Untitled parody ("Frankin's Had More. . .") of "Oh, Dear, What Can the Matter Be?"
Silber, *supra,* at 275.

"Fare You Well" parody of "Tavern in the Town"
Id. at 275-76.

"Good Night, Perkins" parody of "Good Night, Ladies"
Id. at 278.

"Mister Congressman" parody of "Little Brown Jug"
W. Hille, ed., *The People's Song Book* 117 (1948).

"The Scabs Crawl In" parody of "The Worms Crawl In"
Id.

Parody with the same title of "I'm Just Wild About Harry"
Silber, *supra,* at 282.

"Adlai's Gonna Win This Time" parody of "Get Me to the Church on Time"
Id. at 292.

Special campaign parody version of "High Hopes"
Id. at 295.

"Hello, Lyndon" parody of "Hello, Dolly"
Id. at 297.

Untitled parody ("Oh, He Runs Hot. . .") of "Yankee Doodle"
J. Harris, lyrics. Published by A. A. Records & Harry Stoones, Inc. (1964).

Modern parody of "Hallelujah, I'm a Bum!"
B. Dane, *et al.,* "Songs of the G.I. Resistance" (record album lyric sheet) (1970).

"Hark When Gerald Ford Was King" parody of "Hark, the Herald Angels Sing;" "Ol' Man Gipper" parody of "Ol' Man River;" "I Wanna Be Your Pander Bear" parody of "Teddy Bear"
The Capitol Steps.

EXHIBIT 4

EMI MUSIC PUBLISHING
810 Seventh Avenue New York, NY 10019

Linda Santiago
Director, Copyright Administration

May 4, 1993

Mr. Bill Strauss
Capitol Steps Productions
1505 King Street
Alexandria, VA 22314

Dear Mr. Strauss:

I apologize for this delayed response with respect to whether or not your use of our songs is considered parody or fair use.

I sent your package to our attorney. Frederick Silber, and there is no question that your use of the songs is not fair use. You included those parodies on LP's cassettes and CD's which are being sold.

The fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching, scholarships or research is not an infringement of copyright. However, once that use is of a commercial nature it is no longer considered fair use.

I am requesting a complete and thorough listing of all EMI songs that you have included on recordings, together with record numbers, LP titles, release dates, etc. If I don't receive such list within a week of your receipt of this letter, legal action will be taken. If you have any questions you can contact Frederick Silber directly at 212-492-1248.

Sincerely,

/s/ Linda Santiago
LINDA SANTIAGO

cc: Landry, Rosenthal, Silber

APPENDIX B

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF MARK RUSSELL

1. My name is Mark Russell. I am a political satirist.

2. I have been performing in the Washington, D.C. area and nationally and internationally for nearly 40 years. I have regularly appeared on national network radio and television For the past 18 years I have appeared on an every-other-month basis on the "Mark Russell Comedy Specials" on public television. I have appeared on nearly every national news show. I have been a regular contributor to "Good Morning America", and was a co-star of the NBC show "Real People".

3. I also appear in concert around the country. In 1992, alone, I appeared in more than 130 shows in 30 states, including those of the Sixth Circuit. I have appeared before the American Bar Association, the National Association of Broadcasters, and the Federal Communications Commission. I have appeared before, and at the

behest of nearly every president and vice president since Lyndon Johnson. I have also appeared at events at the request of former Chief Justice Warren Burger, numerous members of Congress, presidential candidates, governors and state representatives of both parties.

4. I trace my start in political satire to the suggestion of members of Congress and their staffs. In 1958, I was performing the works of others, including Tom Lehrer, in the Carroll Arms Hotel, in Washington. Since it was the closest bar to the Hill, it was where many Congressmen and their staffs ended their day. It was here that I began singing and talking about the events in Congress. As I wrote in the introduction to *Presenting Mark Russell* (Everest House Publishers, 1980), "my act is basically the same as it has been since 1961; only the names, as they say, have been changed to protect the retired and deceased."

5. Along with spoken material, I perform song parodies, to both copyrighted and original melodies. A current parody of a copyright work is "Disney" to the tune of "High Ho, High Ho" from Walt Disney's "Snow White and the Seven Dwarves." This song is a commentary on recent reports that during the McCarthy period of the 1950s, Walt Disney had reported to various federal authorities on the activities of individuals he believed to be subversive.

6. I do not seek nor do I obtain license from copyright owners for several reasons. First, I have been advised that my use of copyrighted songs constitutes "fair use" of the copyrighted material. Second, the very nature of social and political satire makes it impossible to obtain timely permission. When, for instance, it's known that the President has spent $200 on a haircut, it is not possible to wait more than the few hours necessary to write and memorize "He Looked Pretty" to the tune of "I Feel Pretty." When the video tape of the Rodney King beating became known, it was not possible to wait for more than the few hours necessary to write and memorize

"On The Streets of LA" to the tune of "On the Street Where You Live."

7. It is not possible to wait for permission because at 7 or 8 pm on a Friday evening there is no way to get in touch with someone who might be able to get in touch with someone from whom permission might be obtained: the story may not last more than one day—in which case the exercise of getting permission would be moot; and because audiences have come to expect comment in song on the topic of the day from me. To wait for permission means to disappoint an audience—something that I, as a professional performer would try never to do. On the rare occasion when permission has been requested it was denied. On one particular occasion, NBC made the request of the Disney Studios that just the first notes of its copywritten song "Chim-Chimney" be used to start my song about Gary Hart's trip to Bimini. I started my song "Bim-bimini".

8. Asking permission would also be interpreted by music publishers as a request for an endorsement of the political ideas contained within the lyrics. Since the comments contained within a song are mine, no endorsement is needed or wanted. In my nearly 40-year career I have never been sued for copyright infringement; nor has anyone ever claimed to be injured by what I have said or sung.

9. I see no real or discernable harm to song publishers from my performances. People who book Mark Russell, or purchase a ticket to one of my concerts or tune in to my television show do so because they want to hear what I am saying or singing about the current political scene. They are less interested in the song I parody; other than perhaps some in the audience will get the intended pun. Rather the audience is interested in what I am saying with the lyrics, whether they agree with the viewpoint or not. In addition, and most important, they are there to be entertained.

10. I have read the opinion issued by the Sixth Circuit Court of Appeals in this action. I am concerned that this opinion may cause colleges and organizations within the Sixth Circuit's jurisdiction who have considered booking me to look else where to fulfill their entertainment schedule rather than take the chance of becoming embroiled in a legal controversy. I also see a situation whereby I could sing a song in one state but not another, if this opinion were allowed to stand.

I make the foregoing declaration under penalty of perjury this 27 day of May, 1993.

/s/ Mark Russell
MARK RUSSELL

APPENDIX C

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF BARRETT E. HANSEN,
p/k/a "DR. DEMENTO"

1. My name is Barret E. Hansen; I am professionally known as "Dr. Demento." Since 1970, I have conducted a weekly radio program consisting primarily of humorous songs. The program has been nationally syndicated since 1974, and is currently heard on approximately 100 stations, plus the Armed Forces Radio Network. In Washington, the program is heard weekly on WHFS-FM.

2. Parody songs have been a major part of the program from the beginning, and have become even more popular in recent years. Since my program is probably the major radio outlet for humorous songs in the United States, I receive dozens of taped parodies each month.

3. In addition to parodies by recognized artists such as "Weird Al" Yankovic and The Capitol Steps, I receive many parodies contributed by amateur and semi-profes-

sional artists from all walks of life. Some of these have become quite popular with my listeners.

4. I should explain that when I use the terms "parodies," or "parody songs," I include any kind of humorous song which uses an existing melody and original words to make a comment—whether the comment is directed at the underlying song or its performer, or at some political or social issue. Parody has proven especially fruitful as a vehicle for social and poliitcal commentary; of the more than 100 songs I received concerning the recent Persian Gulf conflict, the vast majority were parodies.

5. In the course of conducting my radio program, I am often in contact with parody aritsts, both amateur and professional, from around the country. As a result, I am probably as knowledgeable about current trends in musical humor generally, as anyone in the country. The statements I make in this declaration are based on that experience.

6. To begin with, the notion that permission for musical parodies is easy to obtain, or even obtainable at all in many cases, is simply not true. I have received many letters from people who have written song parodies, and have submitted them to the publishers of the originals before attempting to distribute them to me or anyone else in radio—mostly because they had read that Al Yankovic does it that way. Unfortunately, even those publishers openminded enough to give consent for an Al Yankovic parody (with its considerable income potential) are rarely inclined to give similar consent to an unknown parodist, whatever the merits of the parody.

7. Even Al Yankovic himself got his foot in the door, so to speak, by doing unlicensed parody early in his career. It was only after his songs gained airplay (mainly on the Dr. Demento Show), and one of them was released on record (thanks to the lucky chance that a member of the group being parodied happened to hear the parody on my program, and had an ample sense of humor) that Yankovic began to gather the "clout" to

have whatever negotiating power he now has. Moreover, even with his track record, Al has been turned down many times by publishers.

8. Second, I cannot see how a parody song could reach a wide audience today through strictly "noncommercial" means. The Dr. Demento Show, for example, is a commercial enterprise; and when people record and sell songs their purpose is generally at least in part commercial. To say that commercial parody cannot occur without permission from the copyright holder is for practical purposes the same as saying that no parody can occur without such permission.

9. The overly cautious and humorless attitude of music publishers has deprived the world of a chance to hear many truly excellent parodies through the years. An especially galling example, in my opinion, was the refusal of the copyright owners of *My Fair Lady* to grant permission to the late Allan Sherman to record his parodies of songs from that musical. Giving publishers the right to act as arbitrary censors, as that publisher did, is not consistent in my opinion with the American tradition of free speech and expression.

I make the foregoing declaration under penalty of perjury, this 7th day of May, 1993.

/s/ Barret E. Hansen
BARRET E. HANSEN
p/k/a Dr. Demento

APPENDIX D

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF BRUCE W. KERR

1. My name is Bruce W. Kerr, p/k/a "Loose Bruce Kerr." Although I am a lawyer, licensed to practice law in Wisconsin, since 1972 I have made my living as a singer, songwriter, and song parodist in Mountain View, California.

2. I perform in several clubs in the area, as well as before groups such as the Kiwanis and Chamber of Commerce. I currently receive radio airplay for my musical parodies of politics and society on shows such as "The Rush Limbaugh Program" (song: "The Twelve Days of Clinton"), "The Dr. Demento Show" (song: "The Ballad of Woody & Mia"), the Jim Bohannon Show, and the CBS Radio Satellite Network. My parodies have closed out network news programs (e.g., "Gorby," CNN Network News, June 1990), have been heard on the Armed Forces Network ("Scudbusters"), and have received other forms of coast-to-coast radio and television coverage.

3. In 1977, I founded a music publishing company, "Marjorie Music Co.," which holds the copyright to my parody lyrics. In 1987, I founded a record company, "Broken Records," in response to receiving extensive radio airplay in California of a musical parody called "Walk Like a Deukmejian." The song was a parody of the number one hit song, "Walk Like an Egyptian," and concerned the political disputes between California's then-Governor and the former Chief Justice of the California Supreme Court, Rose Bird, who had just been ousted from office by the electorate. I recorded "Walk Like a Deukejian," and began receiving airplay for it, without applying for or receiving a copyright license.

4. After my parody began receiving airplay in California, I was contacted by the copyright holder of the original work, Peer International Corp., which demanded that I apply for a license to continue using my parody. They told me that they had already granted one license to "Walk Like an Egyptian," but had denied another. I did apply for a license, and after a six week wait learned that my application had been approved, but only on condition that I sign over all rights to my lyrics to Peer International. Since I certainly did not have enough money to engage in a legal battle with a music publisher, I agreed. Attached is a copy of my contract with Peer International Corp.

5. Another incident occurred in 1989, when I wrote a parody of Joni Mitchell's song, "Woodstock." My parody was called "Oldstock," and described how the "Woodstock generation" had aged in the twenty years since the festival had taken place. After submitting an audio tape of "Oldstock" to VH-1, a music video network, I was told that they would be interested in using the parody if I could secure permission from the copyright holder. I made application to Siquomb Publishing Co., which held the copyright to the original, but after

a delay in which they apparently submitted my lyrics to Ms. Mitchell for her review, permission was denied.

6. As a result of these and other experiences, I now perform parodies without seeking or obtaining copyright license. I avoid applying for such licenses because such applications are generally a waste of time, and I fear that a denial of a license might make subsequent airplay of the parody appear to be intentional infringement, and become the basis of legal action. Moreover, the time delays involved in applying for copyright permission are incompatible with the creation of song parodies relating to current events. It took me six weeks to receive permission for "Walk Like A Deukejian;" but I have had song parodies rejected for radio airplay because they were "one day stale."

7. It is my experience that, because of its peculiar nature, parody is sometimes the only effective vehicle to express a given satirical opinion of a current event, or to give voice to a commonly held public view on an issue. It seems to me that we should not let the copyright owner of a work that is sometimes a part of what is being mocked or commented upon disallow that expression. This specific collateral use of an "underlying work," which we call parody, should be kept free in a society which wishes to stay so.

I declare that the foregoing is true, to the best of my knowledge and belief, under penalty of perjury, this 18th day of May 1993.

/s/ Bruce W. Kerr
BRUCE W. KERR

EXHIBIT 1

Date: 2/23/87

PEER INTERNATIONAL CORPORATION
1740 Broadway
New York, New York 10019

Gentlemen:

We hereby confirm our request for your permission to use your copyrighted musical composition entitled, WALK LIKE AN EGYPTIAN composed by Liam Sternberg, as outlined below:

As your employees-for-hire I will compose a parody under the title, WALK LIKE A DEUKMEJIAN containing your music and the lyrics annexed and marked Exhibit A.

As your employees-for-hire, you will own the said parody and all rights therein including the copyright as a work for hire throughout the world.

I am not to receive any compensation as a composer of the parody or otherwise for any present or future use of said parody.

Your ownership of the copyright in said parody is entirely unencumbered and without any obligation to compensate me.

In the event that I produce phonorecords embodying the parody I shall be required to obtain from you a separate mechanical license authorizing said use, which license shall provide for a royalties rate of five ($ .05) cents per copy for each phonorecord manufactured and I will pay you in advance upon the signing of such license a fee to cover the initial pressing of 500 units.

Very truly yours,

/s/ Bruce Kerr
BRUCE KERR
c/o Loose Bruce Productions
413 Vasquez Avenue
Sunnyval·, CA 94086

AGREED TO:

PEER INTERNATIONAL CORPORATION

by /s/ Cecile Russo
CECILE RUSSO
Assistant Vice President
of Copyright and Licensing

APPENDIX E

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF NANCY HOLSON

1. My name is Nancy Holson. I am one of the producers and the lyricist for "The News in Revue," a musical satire troupe currently located in Westport, Connecticut. "The News in Revue" performs musical political satire on local and national issues. The production, which was originally performed in workshop as "The News" in Norwalk, Connecticut, ran eight shows per a week as an Off Broadway show in New York City from July to Election Day of November, 1992. It currently runs in Westport every Saturday night and for private events.

2. The upfront production costs for a production such as "The News in Revue" are enormous. For example, an enormous investment was necessary for start-up costs to perform the show Off Broadway. Other unavoidable costs include advertising and paying full-time employees ("The

News in Revue" has employed as many as seventeen employees at one time). In order to pay back the original investment and keep the production going, it is absolutely necessary to run "The News in Revue" as a commercial venture.

3. The songs used in "The News in Revue" satirize both local and national politics. For example, when we were performing in New York we used the song "We'll Always be Bosom Buddies" from "Mame" to satirize the political back-stabbing which occurred between Liz Holtzman and Geraldine Ferraro in the New York Senate Primary, a satire which had special comedic force, given that 1992 was termed "The Year of the Woman." This song was chosen because it seemed uniquely suited to convey the humor inherent in the situation. National political parodies have included Dan Quayle singing an angry duet with Murphy Brown to the tune of "The Lady is a Tramp," and Marilyn Quayle espousing her particular brand of less-than-equal rights with a parody of "I Enjoy Being a Girl" from "The Flower Drum Song." Once again, both these songs were selected because they were particularly well-suited for communicating the humorous message which we were attempting to convey.

4. When we decided to open Off Broadway, we were concerned about relying on the fair use doctrine of copyright law to protect us from potential litigation. After interviewing at least five attorneys and being advised that the fair use doctrine was a rather unsettled and murky one, we decided to pursue the route of attempting to obtain and pay for releases from the copyright owners of the songs which we used in our productions.

5. We initially sought the assistance of a specialist in obtaining copyright permissions, and after paying her nearly $1,300.00 we learned that she was unable to obtain a single clearance. We then turned to our attorney, who after the expenditure of much time and labor, and at the expense of over $10,000.00 in attorney's fees, came

up with similar results after submitting requests to use approximately twenty songs.

6. In attempting to gain releases, our attorney contacted either the music publisher or the songwriter or his representative. In denying our requests, the publishers or songwriters gave us a variety of reasons. For example, one publisher denied our requests for the use of several songs because he felt that the use of standards in a political satire could be detrimental to the song itself and at odds with the writer's view as to the song's use and creation. In the two or three cases where our requests were even considered, the approvals were contingent upon a number of conditions: we would have to submit the proposed lyric modifications to the publisher for approval (which approval could be withheld for any reason), we would have to transfer the ownership of any modified lyrics over to the publisher, and the scope of the permitted use would be restricted by the publisher.

7. In one case, the copyright holder not only denied our request for a release, but also suggested changes in the meter and rhyme pattern of our proposed parody. A copy of the response we received to our request for the use of "Don't Get Around Much Anymore" is attached hereto as Exhibit 1. The suggested changes altered the actual content and intent of the lyrics which we had originally submited to the copyright holder. Our song was meant to lampoon the recent, belated decision to place a bust of Spiro Agnew in the Capitol Rotunda. A copy of our proposed lyrics is attached hereto as Exhibit 2. The modified lyrics suggested by the copyright holder do not even mention the bust or the controversy surrounding it, and thus totally miss the point of the our parody. We ultimately decided not to pursue obtaining this release any further, as we felt that we should not be required to modify our lyrics to conform to the copyright holder's aesthetic sensibilities.

8. Ultimately, we were only able to secure one agreement with one publisher, Warner/Chappell, to use two

Cole Porter songs, only one of which was used in "The News in Revue." With regard to the other requests, we decided that the conditions placed upon our use of the songs were too onerous to merit the obtaining of a release, especially given the timely political content of our production. In the time in which it would take to obtain an approval of our lyric modifications, the political commentary of our parodies would lose its humor and grow stale; waiting to obtain pre-approval of our parodies would esentially make performing "The News in Revue" impossible.

9. After much discussion, we decided to go ahead with the New York production of "The News in Revue" irrespective of our inability to gain copyright releases for the songs used in the production. Although there are elements of the fair use doctrine which are not clearly defined, we believed that the intent of the doctrine was to protect the ability of satirists such as ourselves to make social and political commentary. We decided that our show was worth the risk.

I make the foregoing declaration under penalty of perjury, this 17 day of May, 1993.

/s/ Nancy E. Holson
NANCY HOLSON

EXHIBIT 1

HARRISON MUSIC CORP.
INTERNATIONAL MUSIC SERVICE
6253 Hollywood Blvd., Suite 807
Hollywood, Ca. 90028

Tel: (213) 466-3834
Fax: (213) 469-6411

FAX TRANSMISSION FAX # 212-956-2164

DATE: 6/8/92

To: Harvey S. Epstein

COMPANY: Robinson Brog ETC

FROM: Harrison Music Corp.

RE: Parody for "DON'T GET AROUND MUCH ANYMORE"

TOTAL NUMBER OF PAGES, INCLUDING FRONT COVER ————

IF YOU DO NOT RECEIVE THE FULL TRANSMISSION OF THIS FAX, PLEASE CONTACT THE FAX OPERATOR ON (213) 466-3834 IMMEDIATELY QUOTING THE ABOVE REFERENCE.

ADDITIONAL INFORMATION: To reply to your letter of June 3rd, we fully understand your request for approval for the use of our property but in the interest of preserving the integrity of our copyright we would suggest some changes. Although we respect the political intent our preference is to adhere to the original meter and rhyme pattern.

The present parody does not meet our standard for this outstanding and valuable copyright.

Although we wish your clients the best of luck with their project we do not give permission to use their present parody.

/s/ Molly Hyman
MOLLY HYMAN

HARRISON MUSIC CORP.
6253 Hollywood Blvd., Suite 807
Los Angeles, CA 90028
(213) 466-3834, 466-0453
FAX (213) 469-6411

EXAMPLE

Parody for "DON'T GET AROUND MUCH ANYMORE"

Verse:

Had lots of fun in Washington
But now a quiet life have I
If they want me to make the run
Believe me they've got the right guy.

Chorus:

Missed the Watergate trials
All the blood and the gore
Missed the pardon from Jerry
Don't get around much anymore.

Missed the chance to preside
On the old Senate floor
How I miss the debating
Don't get around much anymore.

Left in disgrace
My life was a mess
Now they want my face
Back at the old address.

Etc. etc. etc

EXHIBIT 2

Nancy Holson's Parody of *Don't Get Around Much Anymore* (as sung by Former Vice President Spiro Agnew)

No more a life in Washington,
A quiet, private life have I.
Now they want to hang my picture up
And I'm back in the public eye.

Missed the Watergate trials,
That was lucky for sure.
Missed the pardon from Jerry.
Don't get around much anymore.

Missed the chance to preside
On the senate floor.
How I miss the debating.
Don't get around much anymore.

Left in disgrace,
My life asunder.
Now they want my face
Back in the rotunda.

Silent majority spoke.
Coined that phrase way back when,
Spiro A's back in fashion,
So I might get around again.

(Blackout)

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF MICHAEL HUEY

1. My name is Michael Huey, M.D. I am the Director of the Student Health Service at California State University, Bakersfield campus.

2. I am also a member of, and the lyricist for "The Fabulous Bakersfield Boys," a four singer musical comedy satire group in Bakersfield, California. The group first performed in 1990, and has grown in local popularity; we performed 50 shows in 1992. Although we work principally in Bakersfield and Kern County, we have also performed in San Diego, Los Angeles, and San Francisco.

3. Our songs primarily satirize local Bakersfield issues and personalities. For example, last year we sang "I Wrote the Checks, But the Checks Bounced" (to the tune of "I Fought the Law, But the Law Won"), a song about our local congressman's involvement in the House check writing scandal. Occasionally, however, we do venture into state and national politics, social issues, and even international events (including Desert Storm and

the British royal family). Generally, the group performs for business banquets, Chamber of Commerce meetings, and the like. Our gross receipts for 1992 were $25,000.

4. In the summer of 1992, we decided to cut our first record album. Because we were unsure as to our legal position, we contacted The Harry Fox Agency, Inc. in New York (the principal licensing agency for rights to record copyrighted music). They informed us that we must have "written permission" from the copyright holder for any song parody, so we mailed request letters for twelve songs. In each case, we offered to pay copyright royalties.

5. We received one immediate approval, then nothing else for weeks. However, since we hoped to have the album ready in time for Christmas, we decided to proceed with recording the songs.

6. We spent hours in the studio, and over $1,200 cutting the twelve songs, but the difficulties of obtaining "written permission" became increasingly painful and disillusioning. Two songs were refused outright, even after tapes of our recorded parody were sent for approval. Two other songs were initially refused by the publisher, but later approved when I contacted the agent for the writers directly. Two others were approved by the publisher after several contacts. All four of these approvals were accompanied by a requirement that we sign over all right for the lyrics to the publisher for $1, and agree never to claim authorship of the lyrics in writing or verbally. The final tally: one immediate approval, four delayed and conditional approvals, and two refusals. Five of our requests have been ignored entirely.

7. One of the songs for which we were denied permission was "Phantom of the Clarion," a parody version of "Phantom of the Opera." Our version satirizes a hotel which was supposed to be built adjacent to the Bakersfield convention center, but which remains nothing but a steel skeleton after the expenditure of millions of dollars in public and private funds. Because this is probably

our most popular song, I made multiple attempts to obtain approval, but to no avail.

8. Christmas 1992 came and went, and the album still sits on the shelf. At one point, the group nearly split up over this album mess. Two partners (including myself) wanted to proceed under the "fair use" doctrine, despite the refusals. The other two members refused over fear of a lawsuit. They contended that even the *successful* defense of a copyright lawsuit would destroy the group financially. We remain in limbo as the songs age and lose their topicality.

9. Our experience leads me to several conclusions. First, I do not see how our song parodies could possibly hurt the copyright holder. Our most popular songs are those we write about local political issues and personalities. I do not see how anyone could believe that "Who Wants to Buy Gosford and Ming," a song about the difficulties faced by a local developer at a particular Bakersfield intersection (not on the "album"), could take revenue away from "Who Wants to Buy this Diamond Ring," an old Gary Lewis and the Playboys hit from the 1960's. Yet, even though we offered to pay royalties on every song, seven of the twelve publishers we approached either turned us down or ignored our request for permission.

10. Second, the process of obtaining permissions is so drawn out and problematic that it is impossible to do parody recordings of songs about controversial political issues if permission is required. For example, our check writing song is now old news.

11. Finally, social and political song parody is an American art form with over two centuries of history. Our experience demonstrates to me that puting it into the shackles of a copyright licensing process would effectively eliminate it as an art form, except when performed at such a small scale that it escapes notice by the copyright censors. This result would also eliminate one avenue for the free flow of ideas and opinions that has always characterized American life.

I declare that the foregoing is true, to the best of my knowledge and belief, under penalty of perjury, this 4th day of May, 1993.

/s/ Michael Huey, M.D.
MICHAEL HUEY, M.D.

No. 92-1292

(10)

FILED
MAY 28 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,

Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF THE HARVARD LAMPOON, INC. IN SUPPORT OF PETITIONERS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	2
SUMMARY OF ARGUMENT	4
ARGUMENT	4
I. THE SIXTH CIRCUIT FAILED TO WEIGH PARODY'S SIGNIFICANCE TO THE PROGRESS OF THE ARTS	5
II. COMMERCIAL PARODIES SHOULD NOT BE PRESUMED TO HAVE A HARMFUL MARKET IMPACT	12
CONCLUSION	16

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Page

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	Page
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IN THE

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OCTOBER TERM, 1992

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LUTHER CAMPBELL, a/k/a LUKE SKYYWALKER,
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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE OF THE HARVARD LAMPOON, INC. IN SUPPORT OF PETITIONERS

The Harvard Lampoon, Inc. submits this brief as *amicus curiae* and respectfully suggests that the Court reverse the decision below. The letters of consent of Petitioners and Respondent are being filed with this brief.

STATEMENT OF INTEREST

The Harvard Lampoon, Inc. (the "Lampoon") publishes the nation's oldest college humor magazine, the *Harvard Lampoon*, which first appeared in 1876. S. Eric Rayman & James M. Downey, *100 Years of Harvard Lampoon Parodies* (1976). Literary parodies frequently appear in the magazine's five annual issues; William Shakespeare, Lewis Carroll, and A.A. Milne have all been lampooned by the *Harvard Lampoon*. *Id.* at 4. The Lampoon also publishes parodies of national magazines or newspapers, mimicking the appearance and writing style of the original. Since 1911, the Lampoon has published parodies of *Life*, *The Saturday Evening Post*, *Vanity Fair*, *Popular Mechanics*, *Lady's Home Journal*, *Town and Country*, *Esquire*, *Newsweek*, *The New Yorker*, *Mademoiselle*, *Time*, *The New York Times*, *Sports Illustrated*, and *USA Today*. The Lampoon has produced a book length parody of J.R.R. Tolkien's *Lord of the Rings* (entitled *Bored of the Rings*), and two sound recordings of popular songs. *Id.*

The 1966 parody of *Playboy*, the first Lampoon parody to be distributed nationally, sold a half million copies. *Id.* at 5. In 1972, after *Cosmopolitan* featured the actor Burt Reynolds as the first nude male centerfold, the Lampoon published a parody of *Cosmopolitan* with a photo-montage of Henry Kissinger as its centerfold. *Id.* at 6. The edition sold more than a million copies, and the centerfold was reprinted in Saigon's largest newspaper the day Kissinger arrived in South Vietnam with the Paris peace plan. President Thieu reportedly believed that Kissinger had posed for the picture, and Leonid Brezhnev pinned it up in his office. Walter Isaacson, *Kissinger: A Biography* 363 (1992).[1]

After graduation from Harvard College, former Lampoon editors continue to perpetrate parodies. In 1970, three Lampoon editors licensed the Lampoon's name and established an independent humor magazine, the *National Lampoon*. *See National Lampoon, Inc. v. American Broadcasting Cos., Inc.*, 376 F.Supp. 733, 737 (S.D.N.Y.), *aff'd*, 497 F.2d 1343 (2d Cir. 1974). Former Lampoon editors write and produce major television comedy shows, including *Saturday Night Live*, *The Bill Cosby Show*, and *The Simpsons*. *See* Craig Lambert, *Comic Sutra*, Harvard Magazine, July-August 1992, at 24-40. Indeed, Conan O'Brien, NBC's designated replacement for David Letterman, is a former Lampoon president.[2]

In short, parody is the life-blood of the Lampoon, just as it is the stock-in-trade of many other college humor magazines. Although the Sixth Circuit's decision directly threatens only "commercial" parodies, the term commercial is so vague and over-broad that the Sixth Circuit's decision will have a chilling effect on all parodists. For this reason, the Lampoon files the first *amicus* brief in its history.

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[1] For the record, the Lampoon has never parodied an opinion of the Court. However, it once satirized the selection process for Supreme Court Justices. 1969 *Time* parody, *reprinted* in Rayman & Downey, *supra*, at 142.

[2] Another Lampoon alumnus, Levin Hicks Campbell, was appointed by President Nixon to the U.S. Court of Appeals for the First Circuit. Some Lampoon alumni, however, have not fared as well. Elliot L. Richardson, for example, had difficulty holding onto a job during the Nixon administration.

SUMMARY OF ARGUMENT

This brief addresses two narrow points. First, it highlights the central role that parody plays in the progress of the arts—a role the court below improperly overlooked. Second, this brief urges the Court to clarify that the presumption first announced in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), that commercial uses are harmful to the market for the copyrighted work, does not apply to parodies.

ARGUMENT

Parody almost inevitably requires the copying of protected expression. If there were no fair use doctrine, virtually every unauthorized parody of a copyrighted work would infringe.

This case required the Sixth Circuit to balance two competing tenets of the fair use doctrine: that parody occupies a favored niche in Section 107's design and that "commercial" uses are presumptively harmful to the market for the copyrighted work. Instead of carefully weighing these competing tenets, the Sixth Circuit shortchanged the first and put a heavy thumb on the scale for the second. Almost every case in which a parodist has invoked the fair use defense has involved a commercial use; to give such preemptive weight to the fact of commercial use would eliminate the parody defense. The resulting suppression of parody would contradict the ultimate purpose of the Copyright Act, which the Court has recognized as "promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Judge Nelson's cogent dissent identifies the errors of the decision below. *Acuff Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439-46 (6th Cir. 1992) (J. Nelson, dissenting). This brief amplifies two of Judge Nelson's observations. First, the brief shows how, as a significant art form, parody deserves a favored status under Section 107 that the copyright law should promote, not suppress. Second, the brief suggests that the court below gave an overly broad scope to the presumption that "commercial" uses have a harmful market impact.

I. THE SIXTH CIRCUIT FAILED TO WEIGH PARODY'S SIGNIFICANCE TO THE PROGRESS OF THE ARTS

The decision below acknowledged that parody deserves preferred treatment under Section 107's first factor, the purpose and character of the use. 972 F.2d at 1435. However, in evaluating this factor, the Sixth Circuit failed to attach the same valence to Petitioners' parodic purpose as it did to the commercial nature of the use. In a word, the Sixth Circuit did not take parody seriously.

Judge Nelson's dissent, by contrast, took parody very seriously, and discussed at length the case law reflecting parody's favored status under Section 107. 972 F.2d at 1440-42. The briefs of Petitioners and their other *amici* explore one of the rationales for this status: the significance of parody to political discourse. Here the Lampoon wishes to highlight another—and arguably the central—rationale for parody's favored status: the significance of parody to the progress of the arts.

Parody has existed in many societies, and has been recognized as a distinct artistic creation almost from

the beginning of literature. *See* Leon R. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 Can. Bar Rev. 1130, 1133 (1955). Homer appears to have been the first target of parody: "The rhapsodists who strolled from town to town to chant the poems of Homer were immediately followed by another set of strollers—buffoons who made the audiences merry by the burlesque turn which they gave to the solemn strains." Dwight MacDonald, *Parodies* 562 (1960) (quoting Isaac D'Israeli, *Curiosities of Literature*). In *Batrochomyomachia*, for example, frogs and mice battled as if they were Homeric heroes. *Id.* Aristotle referred to Hegamon of Thasos as "the inventor of parodies" for his play *Gigantomachia*, a Homeric parody celebrating the victorious exploits of what was actually an Athenian defeat in the Syracusan expedition. Yankwich, *supra*, at 1133; MacDonald, *supra*, at 562. Greek parody reached its zenith with Aristophanes, who mocked the philosophy and style of Aeschylus, Euripides and Socrates in *The Frogs* and *The Birds*. *Id.*

Although it was once believed that parody did not "appeal[] to the ancient Hebrews," MacDonald, *supra*, at 562, recent scholarship has concluded that the Book of Jonah was written originally as a parody of prophetic literature specifically and biblical literature generally. *See, e.g.*, Arnold J. Band, *Swallowing Jonah: The Eclipse of Parody*, 10 Prooftexts 177 (1990). The book's situations (a big fish swallowing a prophet!), puns, inversions, and exaggerations suggest that the text produced in the fifth century B.C.—at about the same time as Aristophanes' plays—was understood by contemporary readers to be a parody of earlier biblical texts. During the two or three centuries between the

creation and the canonization of the book, "the audience changed and its capacity to grasp the parodistic elements in the text diminished, even disappeared." *Id.* at 191. Because "parody must include a pretext," it is "susceptible to 'misunderstanding.'" *Id.* at 192. Moreover, during the canonization process, the rival factions "consciously or unconsciously . . . shaped the image of the prophet according to their views." *Id.* Thus, "the canonizing community could swallow the Book of Jonah just as the big fish had swallowed Jonah himself." *Id.* at 194. Without parody, a powerful holy text read in synagogues on the Day of Atonement and representing for Christians a prefiguration of the Resurrection might never have been created. *Id.* at 183.

The Romans produced many parodies, often focusing on Virgil. Yankwich, *supra*, at 1134. During the Middle Ages, parodies of the Scriptures and the Mass were popular. *Id.* The fourteenth and fifteenth centuries produced parodies of legal decisions involving religious figures. *E.g.*, Bartolo of Saxoferrato, *Processus Satanae Contra Virginem Coram Justice Jesus* ("Satan's suit against the Virgin, heard before Judge Jesus"). In the seventeenth century, Cervantes wrote *Don Quixote* as a parody on the Spanish novel of chivalry, and in the process created one of literature's most memorable metaphors—tilting at windmills. Yankwich, *supra*, at 1134. Moreover, Cervantes' characterizations inspired one of Picasso's most evocative paintings.

Starting with Geoffrey Chaucer, almost every major British author has written parodies, including Ben Jonson, Alexander Pope, William Shakespeare, Jonathan Swift, Daniel Defoe, Henry Fielding, Jane Aus-

ten, Samuel Johnson, John Keats, Lord Byron, and Lewis Carroll. MacDonald, *supra*, at xvii-xxiii. One of the richest novels written in English, James Joyce's *Ulysses*, is a parody of Homer's *The Odyssey*.

On this side of the Atlantic, Bret Harte parodied James Fenimore Cooper, John Updike (a former Lampoon president) parodied Jack Kerouac, and virtually everyone, including the Lampoon, has parodied Ernest Hemingway. A major forum for American parody, in addition to the Lampoon, has been *The New Yorker* magazine, which has published parodies by Robert Benchley (another former Lampoon president), S.J. Perleman, James Thurber, and E.B. White. MacDonald, *supra*, at 567.

Parody, of course, is not restricted to literature. Bach, Mozart, and Beethoven have all been parodied, as well as the *Mona Lisa*, *The Last Supper*, and the works of Picasso and Vermeer. Linda Hutcheon, *A Theory of Parody* 8 (1985). Much of postmodern architecture is parodic, *id.* at 11, and films are also fertile grounds for parody (*e.g.*, Woody Allen's parody of *Casablanca* in *Play it Again Sam*). *Id.* at 25; *see also White v. Samsung Elecs. Am., Inc.*, No. 90-55840, 1993 WL 73915 at *8, n.25 (9th Cir. Mar. 18, 1993) (J. Kozinski, dissenting).

Parodies progress in cycles. Shakespeare parodied Marlowe, then Marston parodied Shakespeare; Hemingway parodied Sherwood Anderson, then E.B. White parodied Hemingway; *Star Wars* parodied *The Wizard of Oz*, then Mel Brooks parodied *Star Wars* in *Spaceballs*.[3] Yankwich, *supra*, at 1135; MacDonald,

[3] The 2 Live Crew also parodies *Star Wars*; one of its member's pseudonym is Luke Skyywalker, and its record company is Luke Skyywalker Records (Luke Skywalker is the hero of *Star Wars*).

supra, at 560-61; Hutcheon, *supra*, at 27; *White*, 1993 WL 73915 at *8, n.25.

In recent years, an extensive scholarly bibliography concerning parody has developed. *See, e.g.*, Hutcheon, *supra*, at 118-135. Parody is recognized

> as an intuitive kind of literary criticism, shorthand for what "serious" critics must write out at length. It is Method acting, since a successful parodist must live himself, imaginatively, into his parodee. It is jiujitsu, using the impetus of the opponent to defeat him . . . .

MacDonald, *supra*, at xiii. *See also* Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. Colo. L. Rev. 79, 91-92 (1991); Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into A Juggling Act*, 34 ASCAP Copyright Law Symposium 1, 4 (1987).

The role of parody may be evolving. One of the leading theorists of parody writes that "parody in the twentieth century has gone beyond [the] conservative function of keeping modishness in line . . . ." Hutcheon, *supra*, at 2. Thus, parody is now understood as "one of the ways in which modern artists have managed to come to terms with the weight of the past." *Id.* at 29. Further, "parody in this century is one of the major modes of formal and thematic construction of texts." *Id.* at 2; *see also* Bisceglia, *supra*, at 5, 33-36. Another student of parody notes that

> [A]n elderly culture like ours is suffused with parody. We are self-conscious, we have the historical sense, we look back on the past. Our avant garde has done a lot of its fighting in the rear. *Ulysses* is a museum of prose styles, *Finnegan's Wake* a course in advanced philology, *The Waste Land* echoes with quotations. Bartok and Stravinsky are archaeologists as well as inventors .... Picasso steals everywhere—from African sculpture, Greek vases, High and Low Renaissance, and above all, from Picasso; his own fence, he disguises the hot jewels in new settings; his parodic talent amounts to genius .... We are backward-looking explorers and parody is a central expression of our times.

MacDonald, *supra*, at xv.

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282, 1289-90 (1991), the Court suggested that it may seem unfair or unfortunate that the fruit of an author's labor may be used by others without compensation, but emphasized that this was "the means by which copyright advances the progress of science and art." *See also White*, 1993 WL 73915 at *4. The fair use doctrine is a means through which the Copyright Act balances incentives to authors to create original works against incentives to other authors to use these creations as building blocks for their own work. *See Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 547 (1985); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980); *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458 (5th Cir.), *cert. denied*, 111 S. Ct. 374 (1990); *Computer*

Associates International, Inc. v. Altai, Inc., 982 F.2d at 693, 721 (2d Cir. 1992). As the Court explained in *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (citations omitted), fair use is an " 'equitable rule of reason' which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster."

Parody occupies a special place in this balance, not only providing entertainment in its own right, but also giving a new or enlarged aspect to the original work being parodied. This is how art evolves.[4] Recognizing the value of parody, courts have long held "that parodists are entitled to borrow more from an author's work than other users." Yen, *supra*, at 84; *see also* Bisceglia, *supra*, at 33. Moreover, Congress specifically supported this sympathetic approach by listing parody as one of the uses courts should safeguard under the fair use doctrine. H. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678-79; Yen, *supra*, at 84-85. Against all of these historical, legislative, and judicial currents, however, the Sixth Circuit disregarded the special role parody plays in the progress of the arts, and thus the "substantial freedom" it deserves under Section 107. *See Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).[5]

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[4] The characteristic of inversion distinguishes parody from run-of-the-mill derivative works, which do not receive favored treatment under the fair use doctrine. The expression in the parody and the original work may be substantially similar on a superficial level, but they have divergent meanings.

[5] The Sixth Circuit's misapprehension of the "substantial free-

II. COMMERCIAL PARODIES SHOULD NOT BE PRESUMED TO HAVE A HARMFUL MARKET IMPACT

In overturning the district court's finding of fair use, the Sixth Circuit attached great weight to the Court's holding in *Sony*, 464 U.S. at 449, that a use for a commercial purpose will presumptively harm the plaintiff. While the Sixth Circuit acknowledged that this presumption is rebuttable, its dismissal of the district court's findings favoring 2 Live Crew reflects the belief that the presumption is difficult, if not impossible, to overcome.

As this case demonstrates, the lower courts are having difficulty applying the presumption created by *Sony*.[6] Judge Nelson and several commentators have questioned the application of the presumption to "productive" commercial uses such as parody. 972 F.2d at 1443; Note, *The Parody Defense to Copyright In-*

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dom" parody deserves is clearly illustrated by its analysis of the "amount and substantiality"—the third fair use factor—of the melody used by 2 Live Crew. In the Sixth Circuit's view, by using "the recognizable bass or guitar riff . . . eight times" 2 Live Crew took "the heart of the original and ma[de] it the heart of a new work" and thus "purloin[ed] a substantial portion of the essence of the original." 972 F.2d at 1438. For a parody to be successful, however, it must "conjure up" the original work, and it can do this only if it uses the "heart" or the "essence" of the original. If 2 Live Crew used a less central reference, its song would not have conjured up "Oh, Pretty Woman" and it would not have been a parody. *See Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980).

[6] This difficulty is exacerbated by the ambiguity of the term "commercial." *See* William W. Fisher, III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1661, 1673 (1988).

fringement: Productive Fair Use After Betamax, 97 Harv. L. Rev. 1395, 1408 (1984); Beth W. Van Hecke, *But Seriously Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 Minn. L. Rev. 465, 489 (1992). *See also* Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137, 1154 (1990). Accordingly, we respectfully suggest that the Court clarify that the presumption arising out of a commercial use does not apply to parodies.

In performing the fair use analysis, courts have historically favored "productive" uses, where the copier adds an original contribution to the copied work, over "non-productive" uses, where the copier appropriates the original without adding a socially valuable creative element. William F. Patry, *The Fair Use Privilege in Copyright Law* xi-xii (1985); *Sony*, 464 U.S. at 455 n.40. Because of parody's contribution to the progress of the arts, it is arguably the most productive of all possible uses.

Significantly, the Court first articulated the presumption that commercial uses harmed the market for the copyrighted work in *Sony*, a case involving a non-commercial non-productive use: home videotaping of television shows. Although the dissent argued that the use was unfair because it was non-productive, 464 U.S. at 480, the majority ruled that the use was fair notwithstanding its non-productive nature largely because it was non-commercial. *Id.* at 451. In the course of discussing the distinction between commercial and non-commercial uses, the majority stated that commercial uses were presumptively harmful. *Id.* at 451. It bears emphasis that the Court created this presumption in the context of a case involving a non-productive use.

In *Harper & Row*, the Court reiterated that commercial uses are presumptively harmful. 471 U.S. at 562. Like *Sony*, *Harper & Row* involved a non-productive use: reprinting a significant passage from President Ford's still unpublished memoirs with "the intended purpose of supplanting the copyright holder's commercially valuable right of first publication." *Id.*

To be sure, the Court applied the presumption of harm to a commercial productive use in *Stewart v. Abend*. 495 U.S. at 237. That case, however, involved the film version of a short story, a far less "productive" use than parody and a use far more likely to interfere with the market for the original work. With a use as productive as parody, the presumption is decidedly inappropriate. *See* Note, *supra*, at 1408 (the presumption is "sensible and appropriate only when applied to commercial *reproductive* uses") (emphasis in original). The presumption of unfairness skews the delicate fair use balance against the parodist and thus against society at large, that would benefit from the parody. *Id.*; *Sony*, 464 U.S. at 478. The presumption leads courts to place too much emphasis on the "commercial" nature of parody, and results in a truncated analysis such as that advanced in the decision below. *See* Bisceglia, *supra*, at 19. By clarifying that the presumption of harm should not apply to parodies, the Court will give parodists a fair shot at the fair use defense.

Additionally, it makes little sense to presume that a commercial parody would have a harmful market effect. Such a presumption may well be reasonable in most cases involving commercial uses because such uses likely would have the same function—and thus

the same market—as the original. A parody, however, typically has a completely different function from the original work, and thus does not "supplant[] any part of the normal market for the copyrighted work." S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975).[7] Accordingly, the presumption that a commercial use will have a harmful market effect should not apply to commercial parody.

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[7] The Senate Report's language is also helpful in determining what weight, if any, should be given to the theoretical possibility of the copyright holder licensing the creation of a parody. Attaching undue significance to the copyright holder's loss of potential royalties for every conceivable use of the work would lead to the evisceration of the fair use defense. *See* Van Hecke, *supra*, at 485; II Paul Goldstein, *Copyright: Principles, Law and Practice* 10.2.2 at 236 (1989). Although a film version of a novel may be part of the novel's "normal market," a parody of the novel should not be so regarded because of its critical nature. *See* Yen, *supra*, at 90. Thus, the analysis of a parody's market effect should be limited to the "potential or actual commercial substitution of the parody for the original." Note, *supra*, at 1410; Van Hecke, *supra*, at 486.

Here, the 2 Live Crew version would be a commercial substitute for the Roy Orbison version only if the works had the same "basic melody" and "fundamental character." If the works did share these characteristics, the 2 Live Crew would be entitled to a compulsory license under 17 U.S.C. 115(a)(2). If they did not share these characteristics, then the 2 Live Crew's version would not have been a commercial substitute, and the fourth factor would have favored the challenged use.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgement of the Court below.[8]

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In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC., MICHAEL JACKSON D/B/A ATV MUSIC, MAC DAVIS, DOLLY PARTON, NASHVILLE SONGWRITERS' ASSOCIATION INTERNATIONAL, NATIONAL ACADEMY OF SONGWRITERS AND THE SONGWRITERS GUILD OF AMERICA IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. AN UNLICENSED MUSICAL PARODY, IF NOT FOUND TO BE A FAIR USE OF THE UNDERLYING COPYRIGHTED MUSICAL WORK, IS AN INFRINGEMENT OF THAT MUSICAL WORK.	6
A. Musical Works Are Given Broad Protection Under the Copyright Act.	7
B. Parodies Are Not the Subject of Any Unique Exemption Under the Copyright Act.	11
C. The Fair Use Factors Allow a Sensible Balance Between the Copyright Owner and the Parodist.	15
1. Purpose and Character of the Use	16
2. Nature of the Copyrighted Work	19
3. Amount and Substantiality of the Use	20

Page

4. Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work 21

II. 2 LIVE CREW'S "PRETTY WOMAN" IS NOT A FAIR USE OF "OH, PRETTY WOMAN." 25

CONCLUSION 28

Page

TABLE OF AUTHORITIES

Cases

Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992) ..... 20 n. 4

Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) 15

Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992) 6

DC Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177 (S.D.N.Y. 1979) 23

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Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) 10, 12, 15, 17, 20, 21, 27

Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) 25

Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) 11, 12, 14, 16, 17, 18, 19, 20, 21, 26

Harry Fox Agency, Inc. v. Mills Music, Inc., 543 F. Supp. 844 (S.D.N.Y. 1982), *rev'd*, 720 F.2d 733 (2d Cir. 1983), *rev'd*, 469 U.S. 153 (1985) 9

Page

MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981) 8, 15, 16, 20

Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351 (N.D. Ga. 1979) 17

Monessen Southwestern Ry. v. Morgan, 486 U.S. 330 (1988) 15

New Line Cinema Corp. v. Bertlesman Music Group, Inc., 693 F. Supp. 1517 (S.D.N.Y. 1988) 14, 16

Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. 124 (N.D. Ga. 1981) 18

Rogers v. Koons, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992) 15, 16, 17, 19

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 8, 17, 18

Stewart v. Abend, 495 U.S. 207 (1990) 13, 14

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) 8

Tin Pan Apple, Inc. v. Miller Brewing Co., Inc., 737 F. Supp. 826 (S.D.N.Y. 1990) 23

Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., Nos. 92-7933, 92-7985, 1993 U.S. App. LEXIS 13454 (2d Cir. June 7, 1993) 18, 19

Page

Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) 12, 20

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 12

Statutes

17 U.S.C. § 101 ..... 9 n. 1

17 U.S.C. § 102(a)(2) 7

17 U.S.C. § 106 .....7, 23, 27

17 U.S.C. § 106(3) 27

17 U.S.C. § 107 .....*passim*

17 U.S.C. § 115 .....9, 19, 23, 24, 27

17 U.S.C. § 115(a)(2) 10

17 U.S.C. § 501 8

17 U.S.C. §§ 502-505 8

17 U.S.C. § 506 8

17 U.S.C.A. §§ 1003-1007 8

Page

United States Constitution

First Amendment 3, 4, 11, 12, 13

Article I, Section 8, Clause 8 14

Other Authorities

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) 10, 13

H.R. Rep. No. 836, 102d Cong., 2d Sess. (1992) ..... 20 n. 4

H.R. Rep. No. 873(I), 102d Cong., 2d Sess. (1992) 8

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Joan Mower, UPI, October 14, 1981, available in LEXIS, Nexis Library, UPI File ..... 13 n. 3

Page

Parody Set, by Harvard Lampoon, N.Y. Times, June 23, 1982 at D-16 ..... 13 n. 3

Scott Donation, Advertising Age, July 24, 1989 at 52 .... 13 n. 3

No. 92-1292

In The

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National Music Publishers' Association, Inc., Michael Jackson d/b/a ATV Music, Mac Davis, Dolly Parton, Nashville Songwriters' Association International, National Academy of Songwriters, and The Songwriters Guild of America (collectively, the "Songwriter/Publisher *amici*") submit this brief as *amici curiae* in support of respondent, Acuff-Rose Music, Inc. ("Acuff-Rose"). Consents of the parties have been lodged with the Clerk.

STATEMENT OF INTEREST

The Songwriter/Publisher *amici* represent creators of musical works. National Music Publishers' Association, Inc. ("NMPA"), with 514 members, is the principal trade association of music publishers in the United States. Because the music publishing business is governed by the Copyright Act, the primary functions of NMPA are to seek enactment of changes or clarifications in the Copyright Act favorable to music publishers, to educate the public on the need for copyright protection and, more generally, to protect the interest of copyrights in musical works. A wholly owned subsidiary of NMPA, The Harry Fox Agency, Inc. ("Harry Fox"), serves as a licensing and collection agent for its 12,000 publisher clients. NMPA and Harry Fox, in serving the interests of publishers, frequently bring or facilitate litigation seeking an interpretation of the Copyright Act and/or relief against copyright infringers.

Michael Jackson, Mac Davis, and Dolly Parton are among America's most popular and successful songwriter-performers. Mr. Jackson's songs include "Billie Jean," "Beat It," and "Black or White." His company, ATV Music, owns a major part of the catalog of the Beatles' songs. Mr. Davis wrote three hits for Elvis Presley, including "In the Ghetto," and has also written songs for Kenny Rogers, Bobby Goldsboro, and O.C. Smith, among others. Ms. Parton has written numerous country classics, including "Coat of Many Colors," "Jolene," "Yellow Roses," and "I Will Always Love You."

Nashville Songwriters' Association International, established in 1967, is a not-for-profit trade association working to advance, promote, and benefit both professional and aspiring songwriters in all fields of music. Based in Nashville, it represents 3800 songwriters who reside in all fifty states and fourteen countries around the world.

National Academy of Songwriters is a twenty-year-old non-profit educational organization committed to advancing the rights and recognition of songwriters. Based in Los Angeles, it has 3000 members around the country.

The Songwriters Guild of America, founded in 1931, is a national voluntary songwriters' protective association with nearly 5000 members. Run by and for songwriters, it has been devoted exclusively to providing songwriters with the services and activities they need to succeed in the business of music, including contract review and royalty collection.

The fair use defense functions as a pressure valve in the Copyright Act, allowing courts to balance and resolve the tension between the interests of copyright owners and the interests of those wishing to use copyrighted works. As devised by the courts and as codified by Congress, the four non-exclusive factors of §107 have served well these competing interests and have allowed each tested case to be fairly evaluated in its own circumstances. Up to now, no type of use has been treated as presumptively "fair" or as altogether shielded by the First Amendment from fair use analysis.

The Court is now asked by petitioners and their *amici* to adjust the valve measurably for parody, and lift it to its own plane of protection. The adverse consequences of this adjustment to owners of copyrights in musical works would be immediate and extreme: they would stand to lose millions of dollars in revenues from their works that Congress intended them to receive as a reward and

incentive for creativity. The Songwriter/Publisher *amici* submit this brief to present the interests of owners of copyrights in musical works and to urge the Court to preserve in their essentials the well-calibrated standards of fair use.

SUMMARY OF ARGUMENT

This case implicates not only the interests of parodists but at least as much the interests of copyright owners. Congress has given broad protection and a bundle of exclusive rights to the owners of copyrights in musical works intending that, through exploitation of their rights, they will be rewarded for their creativity and motivated to compose and publish additional musical works. In ruling on the affirmative defense of fair use in a musical parody case, a court must give full weight to the rights of the owner of the parodied work.

Parody is accorded no unique exemption under the Copyright Act, nor did Congress make parody presumptively a fair use of a copyrighted work. Instead, an unlicensed parody of a musical work, under the structure Congress enacted, is an infringement unless the parody is found to be a fair use under the criteria of §107 of the Copyright Act. The First Amendment does not preclude a finding of infringement; the Copyright Act already embodies First Amendment protection in the idea/expression dichotomy and the fair use defense.

There is no occasion to abandon the fair use test for parody; the non-exclusive factors codified in § 107 have provided a sensible balance when applied by the lower courts in numerous parody cases. As petitioners' *amici* report, parody is flourishing in the setting of these decisions. Under § 107, some works that are claimed to be parodies will be treated as fair uses, so that the parodists may exploit their own works without license from or payment to the owners of the parodied works. Other parodies will

be held to exceed the limits of §107, and — absent licenses from the copyright owners — will be infringing uses. In drawing the line, a court should consider, inter alia, the target of the parody, the degree of commercial exploitation, the amount taken to conjure up the parodied work, and the likelihood of harm to any of the potential markets for an original song.

If the Court were to unleash a sweeping privilege to use copyrighted musical works in favor of parodists, customary practices in the songwriting and music publishing industries would be totally disrupted and songwriters and music publishers would suffer severe economic harm. A shift in law that converts a licensed use into a fair use automatically results in the forfeiture of a portion of the livelihoods of creators of music. The stakes are high: songwriters and music publishers are presently entitled to receive millions of dollars per year from licensed parodies, licensed full lyric substitutions, licensed ads, and licensed rap versions of songs. The magnitude of what is at risk in this case is much greater, because copyright owners are entitled to royalties not merely for one year but for the full terms of their copyrights. A fundamental change in the law of fair use would also hamper owners of copyrights in musical works in their efforts fully to exploit these works in sound recordings and in other media.

The Sixth Circuit's decision is amply supported by the record. In particular, 2 Live Crew's "Pretty Woman" is at the height of commercial exploitation: an expansive use of "Oh, Pretty Woman" conceived for a mass market by a best selling musical group that utilizes the copyright system to protect its own right to revenues from album sales.

ARGUMENT

I. AN UNLICENSED MUSICAL PARODY, IF NOT FOUND TO BE A FAIR USE OF THE UNDERLYING COPYRIGHTED MUSICAL WORK, IS AN INFRINGEMENT OF THAT MUSICAL WORK.

Acuff-Rose has, without question, established the elements of a copyright infringement claim: "Oh, Pretty Woman" is a copyrightable original musical work; Acuff-Rose owns the copyright in this song and has met all statutory requirements to protect its copyright and to bring suit; and 2 Live Crew, with access to "Oh, Pretty Woman," has made an unauthorized derivative work that is substantially similar to "Oh, Pretty Woman." *See generally Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 701 (2d Cir. 1992) (stating the elements of an infringement claim). The sole issue is whether 2 Live Crew has met its burden on the defense of fair use.

Petitioners and their *amici* have addressed almost exclusively the purported parody by 2 Live Crew and the place of parody under the fair use defense. The Songwriter/Publisher *amici* urge that to apply properly the "equitable rule of reason" in this or in any other parody case, a court must give full account to the rights and protections granted by Congress to the owners of the parodied work. We, therefore, first review the statutory framework governing the use of musical works (Point IA). We next turn to the treatment of parody under the Copyright Act (Point IB). With the positions of a copyrighted musical work and a parody under the Copyright Act in clear focus, we then show how the fair use factors as applied by lower courts permit the intended balance between the interests of copyright owners and the interests of parodists, and how a fundamental shift in fair use law to favor parodists would cause substantial economic harm to songwriters and music publishers (Point IC).

A. Musical Works Are Given Broad Protection Under the Copyright Act.

Musical works are expressly recognized under the Copyright Act as protectable works of authorship. *See* 17 U.S.C. § 102(a)(2) (1988). The owner of the copyright in a musical work enjoys the bundle of rights enumerated in § 106 — that is, the

> exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
>
> (4) . . . to perform the copyrighted work publicly; and
>
> (5) . . . to display the copyrighted work publicly.

17 U.S.C. § 106 (1988). Within the songwriting and music publishing industries, the statute gives a copyright owner exclusive control, inter alia, over licensing the distribution of phonorecords of a musical work (the "mechanical right"); the use of a musical work in a motion picture or television show (the "synchronization right"); and the performance of a musical work over the air or in public (the "performance right"). *See generally*

Al Kohn & Bob Kohn, *The Art of Music Licensing* (1992). Congress intended that, through exploitation of their rights, owners of copyrights in musical works would be rewarded for their creativity and thereby motivated to compose and publish additional musical works. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

The bundle of exclusive rights is backed by the remedies for infringement of a copyright in a musical work. *See* 17 U.S.C. § 501 (1988 & Supp. III 1991); *see also id.* §§ 502-505 (delineating the remedies available for copyright infringement); *id.* § 506 (describing the criminal offenses). Courts have time and again issued injunctions and awarded damages against persons who copied a copyrighted musical work — that is, persons who created a substantially similar work having access to the original musical work but without having a license for this use. *See, e.g., MCA, Inc. v. Wilson*, 677 F.2d 180, 187 (2d Cir. 1981).

Congress last year gave added protection to musical works in order to ensure further that copyright owners will be justly compensated. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), this Court held that time shifting of broadcast television shows for non-commercial purposes was a fair use of the copyrighted programs and films. *See id.* at 456. Nonetheless, in recognition of the phonorecord sales income that will be lost through home taping of copyrighted musical works on digital audio equipment, Congress created a new royalty fund derived from the sale of digital equipment and recording media, with the royalties to be allocated among creators of music. *See* 17 U.S.C.A. §§ 1003-1007 (Supp. 1993); *see also* House Comm. on the Judiciary, Audio Home Recording Act of 1992, H.R. Rep. No. 873(I), 102d Cong., 2d Sess. 11-12 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3578, 3581-82.

One statutory exemption is specifically applicable to musical

works: the compulsory license of § 115. Under this provision, once phonorecords of a sound recording have been publicly distributed in the United States with the consent of the copyright owner, anyone else, subject to the express conditions of § 115, may make and distribute phonorecords of a new sound recording of the copyrighted musical work without express permission from the copyright owner.[1] The section provides for payment of a royalty to the copyright owner for each phonorecord made and distributed under the compulsory license. *See* 17 U.S.C. § 115 (1988). In common practice, Harry Fox, as licensing and collection agent for its music publishing clients, grants licenses (which are written variations of the compulsory license under §115) directly to record companies. *See Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F. Supp. 844, 848 (S.D.N.Y. 1982), *rev'd*, 720 F.2d 733 (2d Cir. 1983), *rev'd*, 469 U.S. 153 (1985); Al Kohn & Bob Kohn, *The Art of Music Licensing* 319-20 (1992).

The Copyright Act of 1976 added an important qualification to the compulsory license provision. A person seeking to make a new sound recording may not materially alter the musical work. In the words of the statute:

> A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but *the arrangement shall not change the basic melody or fundamental character of the work*, and shall not be subject

1. In the terminology of the Act, "sound recordings" are works that "result from the fixation of musical or other sounds, but not including the sounds accompanying a motion picture or other audio-visual work" — that is, versions or renditions of musical works. 17 U.S.C. § 101 (1988). "Phonorecords" are the material objects in which sound recordings are fixed and include vinyl records, pre-recorded cassettes and compact discs. *Id.*

> to protection as a derivative work under this title, except with the express consent of the copyright owner.

17 U.S.C. § 115(a)(2) (emphasis added). By this qualification, Congress intended "to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted or travestied." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 109 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5724. As a result, any person seeking to "change the basic melody or fundamental character of the work" requires a license from the copyright owner. *See* 17 U.S.C. §115(a)(2); *see also* 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.04[F] (1991) [hereinafter Nimmer].

Congress, in sum, has given a broad array of exclusive rights to the owners of copyrights in musical works, including the right preserved under § 115(a)(2) to control fundamental changes to their works. These rights are, of course, subject to the fair use defense of § 107. *See* 17 U.S.C. § 107 (1988); 17 U.S.C.A. § 107 (Supp. 1993). The central issue is thus framed. Where no fair use is found, the copyright owner of a musical work can control the creation of a sound recording that fundamentally changes the work, can exclusively license the musical work and can obtain damages and other remedies for an infringing use. In contrast, where fair use is found, the copyright owner has no control over that use and is not compensated for it. Weighing the broad protections Congress intended for owners of musical works, fair use is properly viewed as "a *limited* privilege in those other than the owner of a copyright to use the copyrighted material in a *reasonable* manner without the owner's consent." *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (emphasis added).

B. Parodies Are Not the Subject of Any Unique Exemption Under the Copyright Act.

This Court is urged by petitioners and several *amici* to rewrite fundamental principles of copyright law in order to give enhanced insulation to parodies. Some propose that parody be declared presumptively a fair use; others propose that parody be freed by the First Amendment from at least some of the fair use criteria that apply to news gatherers, scholars, social critics and everyone else. These proposals are entirely at odds with the statute Congress enacted and with prior decisions of this Court.

Parody does not stand alone on a pinnacle of protected speech. There is no unique exemption for parody under the Copyright Act. Congress did refer in its legislative reports to the "use in a parody of some of the content of the work parodied" among "the sort of activities the courts might regard as fair use under the circumstances," *see, e.g.*, S. Rep. No. 473, 94th Cong., 1st Sess. 61 (1975) — although, in the Act itself, Congress did not specifically include parody among the examples of possible fair uses. *See* 17 U.S.C. § 107. Parody is unquestionably eligible for fair use treatment but, for a particular parody to be held to be a fair use, a court must apply the criteria of § 107. Parody cannot be presumptively viewed as fair use. As this Court has held, Congress did not intend

> to single out any particular use as presumptively a "fair" use. The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.

Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539,

561 (1985); *see also Fisher v. Dees*, 794 F.2d at 435 (refusing to classify parody as presumptively fair use).[2]

In *Harper & Row*, the Court explained why the First Amendment, a part of the same Constitution that created the power to grant copyrights, does not override the limitations on use of copyrighted works enacted by Congress. The Copyright Act already embodies First Amendment protection in its "distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use." *Harper & Row*, 471 U.S. at 560; *see also Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978) (stating that the idea-expression dichotomy adequately balances copyright and free speech interests), *cert. denied*, 439 U.S. 1132 (1979); *cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578-79 (1977) (sustaining a right of publicity

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2. The Court's attention is drawn by petitioners and certain *amici* to a passing reference in the legislative reports that "[w]ith certain special exceptions (use in parodies or as evidence in court proceedings might be examples) a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." *See, e.g.*, S. Rep. No. 473, 94th Cong., 1st Sess. 65 (1975). The operative word in this sentence is "might." The Congressional reports did not suggest that all parodies can supplant the normal markets for copyrighted works and still be considered fair use. Instead, each parody must be judged under the criteria of §107 in its own circumstances.

Petitioners argue that their "creative derivative work" should be treated as a presumptively fair use because it "possesses the two fundamental criteria for copyright protection . . . : 'originality' 'and fixation in tangible form.' " (Pet. Br. 12-13). If the fact that a parody qualifies as a copyrightable derivative work gave rise to a presumption of fair use, the defense would eliminate copyright protection for parodied works. In the typical parody case — as in countless infringement cases involving uses other than parody — the allegedly infringing work will qualify as a copyrightable derivative work. *Cf. Harper & Row*, 471 U.S. at 563-64.

claim against First Amendment defense where broadcasters had transmitted the entire act of a "human cannonball"). The idea-expression dichotomy and the fair use defense were initially crafted by courts, before being codified in the Copyright Act, *see* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680; these judicially developed doctrines have permitted our nation's copyright statutes and the First Amendment to coexist comfortably for two centuries.

In this balance between copyright and free speech interests, and under the Copyright Act, a parodist might be unable to meet the fair use criteria as grounds for copying a particular copyrighted musical work without permission. He or she could, as an alternative, seek a license to use the musical work; copyright owners often do license their musical works to parodists. *See, e.g.*, Charles J. Sanders & Steven R. Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 Fordham Ent., Media & Intell. Prop. L. Forum 11, 34-36 (1990) (noting that Weird Al Yankovic obtains licenses to use near verbatim copies of copyrighted music with his original parody lyrics).[3] Consent to a license, however, can be denied. "In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work." *Stewart v. Abend*, 495 U.S. 207,

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3. The Harvard Lampoon's several magazine parodies are examples of works that not only have *authorization*, but also *cooperation*, from the creators of the parodied works. *See, e.g.*, Scott Donation, Advertising Age, July 24, 1989, at 52 (noting that the Forbes Magazine parody was developed "with the cooperation and enthusiasm of Forbes Inc. Chairman Malcolm Forbes"); Joan Mower, UPI, October 14, 1981, *available in* LEXIS, Nexis Library, UPI File (" 'People' magazine . . . gave permission for the Lampoon to imitate its style. . . . A memo from 'People' saying: 'To: The Harvard Lampoon — Compliments from the real thing,' was printed in the parody."); *Parody Set, By Harvard Lampoon*, N.Y. Times, June 23, 1982, at D-16 (discussing the Newsweek parody and noting that "the concept was . . . greeted at the real Newsweek with, if not outright enthusiasm, at least with much cooperation").

229 (1990) (holding that the owner of the copyright in the motion picture "Rear Window" infringed the copyright in the underlying story where the movie was re-released after the grant of rights in the story had lapsed).

Denied a license, a parodist might, among other possible options, seek a license for a different song; use a public domain song; compose a new song to parody another song or some other subject; or alter the planned use of the copyrighted musical work to fit within the confines of fair use. If the parodist elects instead to use the copyrighted musical work without license and is outside the reach of fair use, he or she will, and should, be subject to a finding of infringement. *See, e.g., New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1524 (S.D.N.Y. 1988).

That is the precise lesson of the *Harper & Row* case, in which this Court found a news report on President Ford's pardon of President Nixon to be a copyright infringement because the magazine excessively appropriated President Ford's unpublished memoirs. Inherent in the copyright monopoly recognized by Article I, Section 8, Clause 8 of the Constitution and enacted by Congress is a restriction on the use of copyrighted works:

> In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.

Harper & Row, 471 U.S. at 558. This Court achieved in *Harper & Row* the balance of interests intended by Congress. Notably, after the *Harper & Row* case, Congress amended § 107 solely to state

that an unpublished work is subject to the fair use defense, *see* 17 U.S.C.A. § 107 (Supp. 1993); Congress did not alter § 107 to give presumptive fair use treatment to any type of work. The balance struck by the Court has thus been revisited by Congress and found just. There is no sound basis for the logic of several *amici* that the Court should now reverse course and permit any author of a parody to make totally unrestricted use of copyrighted works, subject only to whether the parody fulfills the demand for the parodied work. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 338-39 (1988) (recognizing that Congress' failure to disturb a judicial interpretation of a statute that has been otherwise amended provides "some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].' " (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979)).

C. The Fair Use Factors Allow a Sensible Balance Between the Copyright Owner and the Parodist.

There is no cause for a sea change in the law of fair use. Both before and after enactment of the Copyright Act, the lower courts have applied the fair use factors now codified in § 107 to claimed parodies. There appears to be no conflict among the circuits. Reflecting the exercise of an equitable rule of reason, courts over the last thirty years have found some claimed parodies to be infringing works, *see, e.g., Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992); *MCA, Inc. v. Wilson*, 677 F.2d at 185; and others to meet the fair use defense, *see, e.g., Fisher v. Dees*, 794 F.2d at 440; *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). In the meantime, parody has been alive and well in the United States — indeed, as recounted in detail by petitioners' *amici*, parody has been flourishing.

As the law has developed, courts have added nuances to the fair use factors that are especially relevant when a claimed parody is present. The Songwriter/Publisher *amici* urge that the Court

include these nuances, to which we now turn, in ruling on fair use in this case.

1. *Purpose and Character of the Use*

The threshold question in a fair use parody case is whether the defendant actually intended to, and did, create a parody. Because invocation of the word "parody" can potentially turn an infringement into a protected use, the courts have properly scrutinized the true purpose of the defendant's work. *See, e.g., New Line Cinema*, 693 F. Supp. at 1525 (expressing "serious doubts" whether defendant's video was a parody). As the Second Circuit has aptly observed:

> We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism.

MCA, Inc. v. Wilson, 677 F.2d at 185; *cf. Harper & Row*, 471 U.S. at 557 ("The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use 'news report' of the book.").

A vital aspect of the inquiry is to determine the target of the claimed parody; there is no need to draw upon a copyrighted work if the parodist has nothing to say about that work itself. Thus, in *Rogers v. Koons*, the Second Circuit held that the "purpose and character of the use" factor cut against a finding of fair use because the defendant's sculpture, which was slavishly copied from plaintiff's photograph, sought only to parody society at large and

not the photograph itself. *See Rogers v. Koons*, 960 F.2d at 310. The court stated:

> It is the rule in this Circuit that though the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.

Id.; see also Fisher v. Dees, 794 F.2d at 436 (holding that the defendant's song "intended to poke fun" at the copyrighted song, and was not "used merely as a vehicle to achieve a comedic objective unrelated to the song, its place and time"); *Metro-Goldwyn-Mayer, Inc v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979) (holding that, in order for a parody to receive fair use protection, it must "make some critical comment or statement about the original work which reflects the original perspective of the parodist — thereby giving the parody social value beyond its entertainment function").

In addition to the purpose, courts look to the commercial or non-commercial character of the use. In *Sony*, this Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." 464 U.S at 451. Quoting this language in *Harper & Row*, the Court added that a desire for monetary gain does not alone tilt this factor against a finding of fair use; rather, the focus is on the degree of exploitation:

> The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.

Harper & Row, 471 U.S. at 562. Put another way, if the intended exploitation unfairly deprives the copyright owner of compensation, the use is not likely to survive as a defense under an equitable rule of reason.

There is a range of commercial exploitation in the area of parody. One important element is how ephemeral a use is made of a work. As certain of petitioners' *amici* recount, parodists who specialize in political humor are constantly changing their material with events of the day. The use of a given song might be only a snippet of one performance, a small part of a show soon replaced by other parodies.

Another important element of fair use analysis is the context of the use; a parody included in a textbook or newspaper, even if the publisher seeks a profit, is part of an educative work. *See Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, Nos. 92-7933, 92-7985, 1993 U.S. App. LEXIS 13454, at *17 (2d Cir. June 7, 1993) ("Most publishers of traditional 'educational' works hope to make a profit, and in many cases ... publishers of traditional 'commercial' work have at least the pretense and often the reality of enlightening the public."); *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981) ("Social commentary placed in a newspaper or magazine is not put to a commer[cial] use simply because the publication is sold rather than given to the public."). Indeed, some persons who are paid for their work display a greater concern for its wide dissemination than for potential royalties. *Cf. Sony*, 464 U.S. at 445 (noting that, in his testimony, television educator Fred Rogers "expressed the opinion that it is a real service to families to be able to record children's programs and to show them at appropriate times").

The opposite extreme is what most concerns the Songwriter/Publisher *amici*: permanent recordings that are sold for a profit, with the degree of concern rising with the level of mass marketing

activity. Parodists in this category are profit motivated; they are not giving their albums away or waiving their own copyright interests. The mechanical right — and the corollary mechanical royalties it produces upon the distribution of phonorecords — is a critical element in the livelihoods of songwriters and publishers. A use of a copyrighted musical work in a mass-marketed parody recording should be treated as presumptively unfair, since the parodist is seeking to exploit the copyrighted musical work for substantial income "without paying the customary price." *Harper & Row*, 471 U.S. at 562; *see also Twin Peaks*, 1993 U.S. App. LEXIS 13454, at *19 ("We have been more solicitous of the fair use defense in works, which though intended to be profitable, aspired to serve broader public purposes.").

2. *Nature of the Copyrighted Work*

The second factor should, in parody cases, almost invariably weigh against a finding of fair use. Parodied works are typically creative, not factual, and are given greater protection from infringement. *See, e.g., Rogers v. Koons*, 960 F.2d at 310. Courts also consider whether the original work was made in anticipation of a financial return, *see id.* at 312; more often than not, parodied works have been created and published with a view to exploiting the panoply of exclusive rights Congress provided.

This second factor should weigh heavily against a finding of fair use in musical parody cases. Under § 115, Congress has assured access to copyrighted musical works for those who wish to make new versions of them — provided the mechanical royalty is paid and the user does not fundamentally alter the musical work. The fair use defense, where sustained, excuses a user from the statutory fee and the restrictions against alteration of the musical work. In view of the balance Congress has already struck in § 115 between copyright owners and prospective users of musical works, courts should, under this second factor, lean away from denying

copyright owners their royalties from, and their control over, musical works.[4]

3. *Amount and Substantiality of the Use*

Extensive appropriation of a copyrighted work is generally inconsistent with a finding of fair use. *See MCA, Inc. v. Wilson*, 677 F.2d at 183. Courts do not permit parodists "to take as much of a component part [of the copyrighted work] as they need to make the 'best parody.' Instead, their desire to make the 'best parody' is balanced against the rights of the copyright owner in his original expressions." *Walt Disney Prods. v. Air Pirates*, 581 F.2d at 758; *see also Harper & Row*, 471 U.S. at 560-69 (refusing to allow a magazine to publish the best news report where it appropriated excessive portions of the copyrighted work).

The Ninth Circuit has fashioned three helpful considerations for "determining whether a taking is excessive under the circumstances — the degree of public recognition of the original work, the ease of conjuring up the original work in the chosen medium, and the focus of the parody." *Fisher v. Dees*, 794 F.2d at 439. As in both the Second and Ninth Circuits, courts should

4. Relying on this Court's observation in *Harper & Row* that "the scope of fair use is narrower with respect to unpublished works," 471 U.S. at 564, the dissent below concluded that the fact that "Oh, Pretty Woman" is a published musical work should tip this second fair use factor in favor of 2 Live Crew. *See* 972 F.2d at 1144. In the face of certain cases after *Harper v. Row* that suggested an unpublished work was never subject to the fair use defense, Congress amended § 107 to provide expressly that the defense is applicable to unpublished works. *See* 17 U.S.C.A. § 107 (Supp. 1993); H.R. Rep. No. 836, 102d Cong., 2d Sess. 4-5 (1992). This Court should nip in the bud the notion that the fact of publication can somehow be scored against the copyright owner of the copied work in applying the second fair use factor. The concept advanced by the dissent would expose the vast majority of copyrighted works to an unjustifiably expanded defense of fair use.

examine whether the defendant took more than is required to recall or conjure up the original work. *See* 3 Nimmer § 13.05(C), at 13-102.28(16) to -102.28(17) (1992); *see also* S. Rep. No. 473, 94th Cong., 1st Sess. 61 (1975) (stating that "use in a parody of *some* of the content of the work parodied" might be among "the sort of activities" treated as fair use (emphasis added)).

Brevity weighs in favor of a finding of fair use. The defense was sustained in a musical parody case where the parody of a full length song ran only twenty-nine seconds, *see Fisher v. Dees*, 794 F.2d at 438, and in another case where the parody lasted only eighteen seconds, *see Elsmere Music, Inc. v. National Broadcasting Co., Inc.*, 482 F. Supp. 741, 747 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980). In contrast, a full length parody typically involves a substantial taking of the copyrighted musical work, which should tilt this third factor against a finding of fair use.

4. *Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work*

This Court has already framed the governing standards for the fourth fair use factor. "[T]o negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.' " *Harper & Row*, 471 U.S. at 568 (quoting *Sony*, 464 U.S. at 451 (emphasis added)). "This inquiry must take account not only of harm to the original but also of harm to the market for derivative works." *Id.* An adverse effect on any of the bundle of rights provided to copyright owners should tilt this factor against a finding of fair use. *See id.* "What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed." *Sony*, 464 U.S. at 451 (emphasis in original).

The Court is urged by several *amici* to find that a parody will not disturb the market of an original music work; it is said that parody reaches a different target audience. The Songwriter/ Publisher *amici* dispute this proposition. The pertinent issue is whether there is some meaningful likelihood of harm to any of the potential markets for an original song. If the Court were to reverse the Sixth Circuit opinion and in doing so alter the fair use standard, songwriters and music publishers would potentially suffer at least five types of harm.

First, despite the assertions of petitioners' *amici*, substantial numbers of parodies are licensed (325a). For example, the Sixth Circuit observed that Weird Al Yankovic — a parodist who records and markets derivative works substituting comedic lyrics while making near verbatim use of copyrighted music — secures licenses from copyright owners. *See* 972 F.2d at 1432-33 n.3. Petitioners themselves equated "Pretty Woman" to Yankovic parodies (87a). Yankovic has released at least five albums to date containing dozens of licensed parodies, generating substantial royalty income for copyright owners. *See* Sanders & Gordon, *supra*, at 36. He has taken licenses of the songs of such composers as Michael Jackson and Billy Joel. Other parodists who have obtained licenses from Harry Fox, acting on behalf of its clients, are Joe Piscopo, Dickie Goodman, Spike Jones, Sheb Wooley, and the producers of "Forbidden Broadway," an off-Broadway review. If parodists are told they may avoid the customary price by invoking the words "fair use," there will be no incentive for them to pay copyright owners.

Second, an expansion of the fair use defense for parody might also interfere with licensing of full lyric substitutions. Harry Fox has issued licenses on behalf of its publisher clients for derivative works which, though not described as parodies, completely substitute a new set of lyrics for use with a copyrighted musical work. One of the most successful examples is the Beach Boys'

"Surfin' U.S.A.," which was a licensed use of the music of Chuck Berry's "Sweet Little 16." "Surfin' U.S.A." has earned millions of dollars in mechanical royalties and continues to be actively licensed some thirty years after release. The derivative work was not treated as a parody when licensed. If all that is required to avoid the need for a license and the obligation to make payments is to say that the new lyrics poke fun at something — like the California lifestyle — there will be a major breach in the protections intended for copyright owners under the Copyright Act.

Third, a revision of the boundary between a fair use parody and an infringing parody might embolden advertisers to claim fair use when copyrighted songs are incorporated into ad campaigns. Sometimes a musical work is simply used in an ad, but often the ad writer makes a parody use of a song. Harry Fox and its publisher clients have issued hundreds of licenses annually for parody uses of musical works in ads. For 1992 alone, Harry Fox collected for its publisher clients almost $4 million from licensed ads, of which half was from licensed ad parodies; these collections represent about 20% of licensed ads using musical works. Unlicensed use of musical works in the promotion of products under current case law is typically not fair use. *See, e.g., Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F. Supp. 826, 831 (S.D.N.Y. 1990); *DC Comics, Inc. v. Crazy Eddie, Inc.*, 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979). It should not be transformed into a free use under the rubric of "parody."

Fourth, an expansion of fair use for parody would jeopardize the ability of copyright owners to license rap versions of their music. While many rap songs are original compositions, others are derivative versions of copyrighted musical works. It is in the nature of rap music that the basic elements of songs are altered (34a at ¶ 15). These changes are often fundamental alterations, and thus require licenses from copyright owners under §§ 106 and 115. For

example, Markey Mark & the Funky Bunch have made a licensed rap version of the rock song, "Take a Walk on the Wild Side," and Run DMC of the rock song, "Walk This Way." If the rap approach to a popular song is treated as "parody" because some changes might be seen as satirizing the original musical work and its underlying values — or, worse, is treated as "parody" because the changes make a social commentary without ridiculing the copyrighted work itself — the royalty income due the copyright owner will be forfeited. Moreover, the release of a "parody" rap version of a song might discourage other rap groups from making licensed rap versions of that song. At stake is a vast market, now separately charted in *Billboard* and representing some 10% of all album sales. Congress did not intend in §§107 and 115 of the Act to make traditional versions of a copyrighted work subject to the mechanical royalty while exempting an entire category of music from the customary price.

Fifth, a full length version of a song that is widely distributed can saturate the market and discourage other users. This is especially true of a derivative work that takes the melody of an original song but substitutes a different set of lyrics. Careful exploitation of a musical work is an important part of the marketing program of the music publisher (324a). A song originally released in one style (*e.g.*, pop) has the potential for adaptation to sound recordings in other styles (*e.g.*, country or rap). Musical works are also licensed for other types of uses, such as motion pictures. For example, Dolly Parton's "I Will Always Love You" was initially released in 1974 as a country music song and became a #1 hit; was revived in the movie "The Best Little Whorehouse in Texas" in 1984 and became a #1 hit again; and was covered once more in the Whitney Houston rhythm and blues version featured in the film "The Bodyguard" and went on to sell in excess of four million copies. When licenses are issued for parody versions of songs, restrictions are often placed on the uses to be made in order to avoid undermining other potential uses. A

redefinition of fair use to widen free copying for parodies would deprive copyright holders of this ability to maximize the exploitation of their works.

The likelihood of harm in any given parody case will vary; the fair use test of §107 is a sensitive barometer. Certain parodies of musical works will qualify as fair uses, with the consequence that the copyright owners of those works are not entitled to royalties from the parodists or other compensation for economic harm. It is no less true that other parodies of musical works will not constitute fair uses, so that the parodists using those works must have licenses to be shielded from infringement liability. This demarcation does not mean courts are being called upon to censor parodies. Instead, courts are required — as they have been since Justice Story's opinion in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) — to test each challenged use under the factors of § 107, looking at objective aspects such as amount taken and potential economic harm and not at aesthetic value. What seems clear beyond question is that the Court should decline the invitation to jettison the carefully evolved fair use factors in order to unleash a sweeping privilege to copy in favor of parodists.

II. 2 LIVE CREW'S "PRETTY WOMAN" IS NOT A FAIR USE OF "OH, PRETTY WOMAN."

Under the terms of § 107, as enacted by Congress and applied by the courts, 2 Live Crew has infringed Acuff-Rose's copyright in "Oh, Pretty Woman." The determination of the Sixth Circuit should be affirmed. Acuff-Rose will undoubtedly present to the Court, in broad strokes and in close detail, the reasons why an affirmance is warranted. The Songwriter/Publisher *amici* set forth below key facts that compel a finding of infringement. Put another way, we highlight the concern that allowing the defense of fair use in this case would threaten to bring about the adverse consequences for songwriters and music publishers described above (Point IC).

Within the range of commercial exploitation in the area of parody, 2 Live Crew's "Pretty Woman" is at the height; a more commercial use would be hard to imagine. At the time the album *As Clean As They Wanna Be* was about to be released, 2 Live Crew had already released two albums that had "gone Gold" (87a) — that is, sold more than 500,000 units (324a). The new album containing "Pretty Woman" was conceived for the mass market; it was predicted by petitioners' agent that the album "will be heard by hundreds of thousands" of persons (88a). By the time of the district court proceedings, this goal had been achieved; 248,000 copies had been sold (85a).

There is no indication in the record that petitioners intended to waive the income that would come to them through the sale of the album. Quite to the contrary, the disc label states "UNAUTHORIZED DUPLICATION WILL GET YOU MESSED UP" (90a). That colloquial formulation, together with the more traditional copyright notice on the album, confirms that petitioners were themselves seeking the protections of the Copyright Act that they now wish to deny to Acuff-Rose. *See also* Pet. Br. 37-38. Petitioners did not always hold this position. At or about the time that the album was released, petitioners understood that they were engaged in a commercial venture and that Acuff-Rose should be entitled to at least the compulsory license fee (85a).

Petitioners and their *amici* express concern about this Court's repeated statement that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Harper & Row*, 471 U.S. at 562; *Sony*, 464 U.S. at 451. This concern, against the present record, is wholly misplaced. The first factor must weigh strongly against a finding of fair use. If the Court were to find in favor of 2 Live Crew, petitioners could justifiably call their next album *As Commercial As They Wanna Be*.

The second factor also weighs heavily in Acuff-Rose's favor. "Oh, Pretty Woman" is a creative work. Because it is a musical work, the compulsory license of § 115 is applicable, permitting a user to make a sound recording of the work subject to the statutory royalty and other provisions of that section. To make a version of this musical work that fundamentally changes its character, however, ordinarily requires express authorization from the copyright owner, and the balance of § 115 should not be quickly disturbed.

The third fair use factor adds markedly to the case against the fair use defense. There is little doubt that 2 Live Crew took a qualitatively substantial amount of "Oh, Pretty Woman," including repeated use of the most familiar musical passage of the song (32a, 139-40a). There was no need for such a substantial taking to conjure up the well-known "Oh, Pretty Woman": the song was a hit upon its release and has long been a "standard" that generates significant mechanical royalties (143-44a). Petitioners' full length song, drawing substantially from the original quantitatively in addition to qualitatively, is far different from the twenty-nine second parody accorded fair use treatment in *Fisher v. Dees* or the eighteen second parody accorded fair use treatment in *Elsmere*.

Finally, 2 Live Crew is in the business of making and distributing phonorecords. A major aspect of the exploitation of "Oh, Pretty Woman" — as expressly provided under §106 of the Copyright Act — is the sale of phonorecords (yielding mechanical royalties). *See* 17 U.S.C. § 106(3). While 2 Live Crew has asserted a parody defense, that is not how it positioned its album in the mass market. Nowhere on the album is there a reference to "parody"; on the contrary, the album gives credit to the composers of "Oh, Pretty Woman" and acknowledges copyright ownership by Acuff-Rose (90a). This album should be viewed as in direct competition with licensed recordings of the original work. Moreover, this version clearly presents competition for prospective rap versions of the

song and for prospective parodies of "Oh, Pretty Woman." Other parodists have shown an interest in the song, making unauthorized versions in the wake of the district court's finding that "Pretty Woman" was not an infringement (326a). A full length, mass-marketed recording of a musical work by a best selling group — especially where, as here, any listener would be able to identify the recording as a version of the original (140a) — is bound to affect potential markets for derivative works of the original copyrighted song. In sum, the fourth fair use factor also weighs heavily against a finding of fair use.

This case could, but need not, be decided largely on the presumption arising from commercial use. There is also ample supporting detail to tilt all factors of the fair use analysis strongly against a finding of fair use.

CONCLUSION

The Court should affirm the judgment of the court below.

Dated: June 28, 1993

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER R. CAMPBELL A/K/A LUKE SKYYWALKER, *et al.*,

Petitioners,

—v.—

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF COMPOSERS AND SONGWRITERS FRED EBB, JOHN KANDER, JERRY LEIBER, ALAN MENKEN, MIKE STOLLER, AND THE ESTATES OR TRUSTS OF IRVING BERLIN, LEONARD BERNSTEIN, IRA GERSHWIN, GEORGE GERSHWIN, OSCAR HAMMERSTEIN, LORENZ HART, DOROTHY AND DUBOSE HEYWARD, JEROME KERN, ALAN JAY LERNER, FREDERICK LOEWE, COLE PORTER AND RICHARD RODGERS, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. COPYRIGHT LAW, THE ENGINE OF CREATIVITY AND FREE EXPRESSION, GRANTS COPYRIGHT OWNERS FOR A LIMITED PERIOD THE RIGHT TO DECIDE HOW AND IN WHAT MANNER TO EXPLOIT THEIR WORKS — SUBJECT TO A NARROW FAIR USE DEFENSE 5

A. Fair Use Is A Limited Defense To A Copyright Owner's Statutory Rights of Exclusivity in Copyrighted Expression 5

B. Congress Refused to Subject Songwriters to Compulsory Licenses for Phonorecords That Would Impair Their Creative Control or the Integrity of Their Compositions 6

II. PARODIC, SATIRICAL OR HUMOROUS USES ARE ELIGIBLE FOR FAIR USE ONLY UPON TRADITIONAL FACT-INTENSIVE, CASE-BY-CASE ANALYSIS, NOT ON A CATEGORICAL BASIS 10

A. Case-By-Case Consideration, Required For Fair Use Determinations Generally, Is Mandated By The Variety Of and Differences Among Works Considered to be Parodies 10

B. Parodies Are Not Entitled to Generic Special Treatment Denied to Other Categories of Speech Eligible to be Fair Uses 15

Page

III. STATUTORY FOUR FACTOR ANALYSIS AND RELEVANT EQUITABLE CONSIDERATIONS COMPEL REJECTION OF ANY PRESUMPTION FAVORING PARODIES OR SATIRES AS A FAIR USE 18
A. First Factor — Purpose and Character of the Use . . 18
1. A Profit-Motivated Commercial Use For Entertainment Purposes Disfavors Fair Use . . . 18
2. First Amendment Considerations Do Not Categorically Favor Fair Use for Parodies, Satires or Humorous Uses 19
3. The Extent of Any Productive and Transformative Use is Part of First Factor Analysis 20
B. Second Factor — The Nature of the Copyrighted Work 21
C. Third Factor — The Amount and Substantiality of the Portion Used 21
D. Fourth Factor — Harm to the Potential Market For or Value of the Work 23
1. Users Have the Burden of Showing that Widespread Uses Like Theirs Would Be Unlikely To Deprive Owners of Potential Licensing Revenues 23
2. Tarnishment of the Work and Satiation of Its Potential Audience Can Have a Serious Adverse Effect on the Copyright Owner's Ability to License Future Uses 25
E. Summing Up the Factors And Deciding the Case . . 28

CONCLUSION 29

ADDENDUM A
EXAMPLES OF LICENSING BY *AMICI CURIAE* A-1

ADDENDUM B
PARODIES IDENTIFIED BY PETITIONERS AND THEIR *AMICI* THAT WOULD NOT HAVE NEEDED TO RELY ON A FAIR USE DEFENSE B-1

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cert. denied, 112 S.Ct. 184 (1991) 24

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960 F.2d 301 (2d Cir.), *cert. denied*,
113 S.Ct. 365 (1992) 11

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667 F.2d 102 (D.C. Cir. 1981),
cert. denied, 455 U.S. 948 (1982) 6, 20

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Page

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Page

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INTEREST OF *AMICI CURIAE*

This brief supporting respondent is submitted in opposition to the misplaced efforts of petitioners and their supporters to persuade this Court to carve out a special presumption favoring commercial parody as a fair use. That presumption would be contrary to the statutory fair use scheme and principles authoritatively expressed in prior decisions.

This brief is filed, with consent of the parties, on behalf of writers and composers (or their heirs) of many of the most well-known, celebrated and prized works of 20th century American music, who believe that their experience and perceptions may be helpful to this Court's further articulation of fair use principles in the context of this case. This *amici* group consists of songwriters and composers Fred Ebb, John Kander, Jerry Leiber, Alan Menken, and Mike Stoller, and the estates or trusts of such luminaries as Irving Berlin, Leonard Bernstein, George Gershwin, Ira Gershwin, Oscar Hammerstein, Lorenz Hart, Dorothy and DuBose Heyward, Jerome Kern, Alan Jay Lerner, Frederick Loewe, Cole Porter and Richard Rodgers, whose musical works are so numerous and well-known that they need no further identification.

SUMMARY OF ARGUMENT

1. There is no more reason for according commercial or other parodies and satirical uses a favorable presumption of fair use than there was in *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985) ("*Harper & Row*"), where this Court rejected a similar plea for special treatment of news reporting uses. Whether a given use of copyrighted expression claimed to be a parody or satirical use is fair use should be governed by the statutory factors and equitable considerations whose application Congress directed on the facts of each case, and that guided this Court's fair use analysis in *Harper & Row*, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony*"), and *Stewart v. Abend*, 495 U.S. 207 (1990) ("*Stewart*"). *See* pp. 5-6, 10-28. On the facts of this case,

such fair use analysis should result in affirmance of the judgment below. *See* p. 29.

2. *Amici* and the many others like them are the intended beneficiaries of Section 115 of the 1976 Copyright Act (17 U.S.C. § 115), which — in a key provision inexplicably omitted from discussion in the briefs of petitioners and most of their *amici* — *excludes* from its statutory compulsory license the making and distribution of recorded performances that pervert, distort, travesty or otherwise alter the "fundamental character" of a copyrighted song. This exclusion was intended and has the effect of granting songwriters and their heirs enforceable rights of creative control and the means to protect the artistic integrity of their works. Copyright owners may choose to grant others permission to make fundamental changes of the song, and to exploit the market in that way, but they may also decline to do so. If parodies are presumptively fair use, however, then the control provided by § 115 is purely illusory and *amici's* songs and music may generally be perverted, distorted and travestied or otherwise altered in the name of parody or satire. *See* pp. 6-9.

3. It is easy to claim that a work is a parody or a satire, and if the judgment below were reversed the number of those who would use the songs of the *amici* and other successful writers and composers for commercially exploitative purposes (whether for travesty, or to free-ride on the original's creativity or popularity), without asking for permission, would promptly and substantially harm the value of their works. A use like petitioners' copying of the central musical theme of "Oh, Pretty Woman," on recordings of which more than 248,000 copies were sold, is not a fair use, and differs in decisive respects from other particular uses that might, in given circumstances, qualify as fair use in accordance with traditional fair use doctrine. *See* pp. 23-28.

ARGUMENT

Amici have earned great artistic success by their many creative achievements, and they continue actively to reap the economic rewards of those efforts both by licensing performance and recording of their works and by authorizing the creation, performance and recording of derivative works. They have, for example, extensively licensed their songs for performance in theaters and cabarets, for use in films, radio and television, and for recordings, and have authorized the creation, performance and recording of parodies, satires, advertising themes and other derivative works based on those songs. Examples of such licensed uses, including parodies of *amici's* works, are provided in Addendum A below.

In often agreeing to requests for such licensing or authorization, *amici* have, to their own economic benefit, disseminated their works even more widely throughout the nation and indeed around the world. When declining such requests, *amici* have often acted in the belief that from an economic standpoint the proposed uses would adversely affect the potential market for future performances of the original work or of previously licensed derivative works, or performances or licensing of new derivative works. On other occasions, *amici* have declined such requests, with equal legitimacy, on grounds of artistic integrity and creative control.[1]

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[1] *See Harper & Row*, 471 U.S. at 555, 564 (recognizing that copyright protects artistic interest in creative control through, *inter alia*, strong right of first publication); *Stewart*, 495 U.S. at 228 ("although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between *the artist's right to control the work during the term of the copyright protection* and the public's need for access to creative works") (emphasis added); *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 23 (2d Cir. 1976) (copyright, including exclusive right to license derivative works, necessarily provides artists with right to control artistic creation). *See also* Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 Harv. L. Rev. 1490,

(continued...)

A producer seeking a license for *My Fair Lady* might have a reputation for mounting dreadful productions; or a proposed singer might be thought incompetent; or a production at the Kennedy Center might be deemed more "prestigious" than a production elsewhere; or a production might alter or travesty the work and make it less valuable in the long run, such as a recently proposed homosexual production of *Oklahoma* under the title *Oklahomo*, for which a license was denied. (Characterizing that production as a parody would not, *amici* believe, make it fair use.)

When *amici* deny licenses to protect against tarnishment they are not muzzling critical reviews. Criticism is not the same thing as perversion, travesty or distortion, or other alteration of a copyrighted melody or its lyrics seeking to hitchhike on its popularity. Neither fair use nor the First Amendment provides an easy shelter for the piggybacking use of a famous melody or its lyrics, in a substantially altered form, where the purpose of that unauthorized use, however characterized, is primarily for commercial gain. Neither do they provide an easement authorizing third parties to take the heart or essence of a copyrighted song, to substitute, for example, coarse or vulgar lyrics, and to justify the distortion by calling it parody, satire or social commentary.

Petitioners and their *amici* contend, in doomsday fashion, that affirmance here would produce censorship antithetical to First Amendment values that would immediately halt the further distribution of socially important criticism and comment, and therefore commercial parody should be given a preeminent favored position in fair use doctrine. As a matter of precedent, experience and public policy, both the premise and the conclusion of the argument are wrong and should be rejected.

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[1](...continued)
1502-04 (1979) (describing how the Act enhanced rights of creative control).

I. COPYRIGHT LAW, THE ENGINE OF CREATIVITY AND FREE EXPRESSION, GRANTS COPYRIGHT OWNERS FOR A LIMITED PERIOD THE RIGHT TO DECIDE HOW AND IN WHAT MANNER TO EXPLOIT THEIR WORKS — SUBJECT TO A NARROW FAIR USE DEFENSE

A. Fair Use Is A Limited Defense To A Copyright Owner's Statutory Rights of Exclusivity in Copyrighted Expression

Section 106 of the Copyright Act of 1976 (17 U.S.C. § 106) grants the copyright owner of a song or other musical work, subject to fair use under § 107 and other exceptions in §§ 108-120, the exclusive right to engage in and authorize others to engage in the following activities: "to reproduce the copyrighted work in copies or phonorecords;" to "prepare derivative works based upon the copyrighted work;" to publicly distribute copies or phonorecords of the musical work; and to publicly perform the musical work. By granting such exclusive rights, § 106 establishes marketable property rights in accordance with the constitutional concept underlying copyright and thereby "supplies the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558 ("the Framers intended copyright itself to be the engine of free expression"); *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

By contrast, fair use under § 107 is a "limited exception" to the property rights conferred by the Copyright Act, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1255 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987). It is a "privilege" allowing the abridgment or copying of copyrighted material in special circumstances without obtaining permission from or compensating the copyright owner, thus depriving the owner of the usual benefits of copyright protection. *Harper & Row*, 471 U.S. at 549. It is an "affirmative defense requiring a case-by-case analysis," whose touchstone, as revealed by such core fair uses as small quotations in reviews, critical articles, news reporting and scholarship, is: "would the reasonable copyright

owner have consented to the use?" *Harper & Row*, 471 U.S. at 561, 550.

The fair use defense is equitable at its core. It requires courts, on the particular facts of each case, to focus on and weigh all of the statutory and other relevant considerations either favoring or disfavoring a fair use in determining whether, on balance, there are compelling equitable reasons to deprive the copyright owner of the exclusive property rights granted in § 106. *See Sony*, 464 U.S. at 448; *Harper & Row*, 471 U.S. at 560.

Notwithstanding the limited and exceptional nature of the fair use defense, exclusive rights of copyright are not antithetical to First Amendment values, but are a central element of a legal structure that fosters the creation of valuable works. *Harper & Row*, 471 U.S. at 546, 558; *Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). Copyright serves that purpose by providing protections and sufficient inducements, most but not all of which are economic, to that creative process. Copyright does not hamper the free discussion of ideas or criticism of works, because the "definitional balance" struck by the idea and facts-expression dichotomy permits the presentation and use of ideas and facts without restriction; only the form of expression is protected. *Harper & Row*, 471 U.S. at 556.

B. Congress Refused to Subject Songwriters to Compulsory Licenses for Phonorecords That Would Impair Their Creative Control or the Integrity of Their Compositions

Any presumption that song parodies may be recorded and distributed under the fair use doctrine would be incompatible with Congress's limitation on the scope of permitted use in § 115 of the Copyright Act of 1976.

Section 115 is the statutory compulsory license that, where it applies, authorizes any person to make and distribute phonorecords of any previously recorded nondramatic musical work such as "Oh,

Pretty Woman" and the thousands of songs written and composed by *amici*.[2] That provision is relevant in analyzing the extent to which parodies of songs are protectable as fair use because Congress specifically *excluded* from the compulsory license any arrangement or derivative work (which would include parody or satire[3]) that would "*change the . . . fundamental character of the work . . . except with the express consent of the copyright owner.*" 17 U.S.C. § 115(a)(2) (emphasis added).

As explained by the House and Senate reports accompanying passage of the 1976 Copyright Act, the statutory license provisions and limitations of § 115 were

> intended to recognize the practical need for a limited privilege to make arrangements of music being used

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[2] Section 115 provides, in pertinent part:

> In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.
>
> (a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.— * * * *
>
> (2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

[3] Although not all parodies are derivative works (*see* n.8 and Addendum B, *infra*), any parody that is "based on" a copyrighted work is, *ipso facto*, a derivative work of that work. *See* 17 U.S.C. § 101 (defining "derivative work" as "a work based upon one or more preexisting works"); *Stewart*, 495 U.S. at 213 n.1 (same).

> under a compulsory license, *but without allowing the music to be perverted, distorted, or travestied.*[4]

Congress limited the compulsory license to recordings that do not make "fundamental" alterations of the original music because of its "strong concern for the original artist's reputation,"[5] and

> respect for the integrity of a musical composition [that] evinces Congressional regard for the moral rights of composers, the sole explicit recognition of moral rights in the entire Copyright Act until passage of the Visual Artists Rights Act of 1990.[6]

Amici do not contend that a derivative work that is ineligible for a compulsory license because it perverts, distorts, travesties or otherwise alters the fundamental character of a copyrighted song is thereby, *ipso facto*, rendered ineligible for fair use as well. *Amici* do suggest that the provisions and purposes of § 115 are very important in fair use analysis of song or musical recordings and, as an expression of congressional policy, should be considered a significant factor disfavoring fair use in cases where the fundamental character of a work has been altered, distorted, perverted or tarnished.

First, § 115 embodies into law a legislative judgment that composers (and their heirs or assignees) have legitimate interests in

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[4] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 109 (1976) (emphasis added); S. Rep. No. 94-473, 94th Cong., 1st Sess. at 89 (1975). Congress imposed a similar limitation in the "Guidelines for Educational Uses of Music" which the House Judiciary Committee endorsed and inserted into the report accompanying the bill enacted as the 1976 Copyright Act. *See* H.R. Rep. No. 94-1476 at 71 (editing or simplifying music purchased for classroom use is fair use "provided that the fundamental character of the work is not distorted or the lyrics, if any, altered").

[5] I Paul Goldstein, *Copyright*, § 5.4.2, at 581 (1989).

[6] 2 M. and D. Nimmer, *Nimmer on Copyright*, § 8.04[F] (1992).

protecting the artistic integrity and creative control of their works. Second, § 115 reflects congressional confidence that courts have the competence to distinguish between song recordings that do and do not change the fundamental character of the original, whether by pervasion, distortion, travesty, or other means. Third, and most importantly, any rule presuming that commercially distributed song parodies are presumptive fair use, as suggested by petitioners and their *amici*, would flout the command of § 115 and its underlying policies. Such a rule, in the guise of fair use under § 107, would allow unauthorized alterations of copyrighted material to be made, performed and widely distributed without the permission of or compensation to the copyrighted owner, when concurrently Congress denied such unauthorized alterations any § 115 privilege of a compulsory license, even on the proffer of the statutory fee (as here, *see* JA 87).

It is therefore difficult to imagine, in the name of parody, satire or social commentary, extending any presumptive fair use rule to changes of lyrics and music such as those made primarily for commercial gain, when those changes alter, distort or degrade the lyrics and the music of the original work and have, in any event, no greater creativity or benefit to society than either the original or licensed derivative works that obtain permission and pay their way. (John Coltrane's celebrated version of Rodgers and Hammerstein's "My Favorite Things" is a well-known example of a licensed alteration of a copyrighted song. What policy is served by requiring payment for his use of "My Favorite Things" but giving The 2 Live Crew a free ride?)

Because the limitation of the § 115 compulsory license to close arrangements was intended to require those who would alter songs to the extent that The 2 Live Crew altered "Oh, Pretty Woman" to obtain the copyright owner's "express consent," any result that presumptively frees them from both the owner's discretion and payment of any required license fees violates the congressional plan.

II. PARODIC, SATIRICAL OR HUMOROUS USES ARE ELIGIBLE FOR FAIR USE ONLY UPON TRADITIONAL FACT-INTENSIVE, CASE-BY-CASE ANALYSIS, NOT ON A CATEGORICAL BASIS

A. Case-By-Case Consideration, Required For Fair Use Determinations Generally, Is Mandated By The Variety Of and Differences Among Works Considered to be Parodies

It is well settled that fair use cannot be determined other than on a case-by-case, fact-intensive basis, and is not susceptible to broad, outcome-determinative generalization. Despite their concentrated attention, able judges since Justice Story, leading commentators, and even Congress itself have been unable to devise any mechanical test or standard that can be applied without focused concentration on and weighing of a variety of relevant factors grounded in the concrete particulars of any particular case. This Court's opinions in *Harper & Row* and *Sony* repeatedly stressed that Congress insisted upon the essential requirement of case-by-case equitable analysis.[7]

Concerning the boundaries of "parody" as it is discussed in copyright cases, as petitioners and their *amici* have unwittingly demonstrated, there is no agreement among the courts or commentators. Proper usage, however, limits a parody to a work that ridicules the work which it mimics.[8] More importantly, for present

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[7] *See Harper & Row*, 471 U.S. at 549, 561, and *Sony*, 464 U.S. at 448 & n. 31. *See also* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Col. L. Rev. 1600, 1601-03 (1982).

[8] A "parody," according to the *Oxford English Dictionary* (1933, reprinted 1978) (emphasis added), is

> 1. A composition in prose or verse in which the characteristic turn of thought and phrase of an author or class of authors are imitated in such a way as to make them appear
>
> (continued...)

purposes, the huge variety of works that petitioners and their supporters consider to be "parodies" and for which they seek expanded and presumptive protection differ among themselves according to a panoply of factors that are relevant to fair use analysis. Those factors lie along at least four separate axes:

- What is the extent of appropriation? Many song "parodies," including a great many cited by petitioners and their *amici*, take no copyrightable expression, mimicking only "style" at a level of generality well beyond that to which copyright ex-

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[8](...continued)

> ridiculous, especially by applying them to ludicrously inappropriate subjects; an *imitation* of a work *more or less closely modeled* on the original, but so turned so as to produce a ridiculous effect . . . .
>
> 2. *transf.* and *fig.* A poor or feeble imitation, a travesty.

See also The American Heritage Dictionary, Second College Edition (1991); *Webster's Third New International Dictionary* (1976). A parody, whatever its form, need not involve any copying, taking or close paraphrasing of the original work, but it must at a minimum make ridiculous what it is modelled on, not some other person or institution. *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986); *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S.Ct. 365 (1992); *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981). Commentators have made the same distinction, *e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1601-02 (1993) (distinguishing and finding important differences between uses where work mimicked "is itself the object of the parody" from uses referred to as satire that use the original work as vehicles to ridicule public figures or other aspects of society or politics). The works cited as parodies by many of the *amici* — including most of the songs of Mark Russell and the Capitol Steps, for example — are not "parodies" at all under correct usage (although they may or may not be fair use, which is quite a different question). In any event, this case does not present any fair use issue concerning such political satires.

tends and therefore raising no fair use issue;[9] some parodies take copyrightable expression but no more than necessary to "conjure up" a parodied original;[10] some take more (and some *far more*) than that.

- How "commercial" is the planned distribution? Some "parodies" are created and distributed pursuant to methodical commercial plans to exploit the mass market for recorded popular music (The 2 Live Crew's album containing "Pretty Woman" sold 248,000 copies by August 1990); others for small cabaret or private performances (the Capitol Steps' "I'm Just Wild About Harry", or "Scalia," which was composed and sung to the melody of Bernstein's *Maria* by reporters at a recent Gridiron Club dinner in Washington, D.C.[11]).

- Is there a parody or satire at all, and if so, how creative and productive is it — where does the work fall on a line from comment or criticism or political satire, on the one hand, to simple free-riding on a recognizable melody, perhaps with the substitution of dirty or offensive lyrics, on the other? Courts are able to determine relevant differences between, on the one hand, The Capitol Steps' "Why Not Take Al and Me," to the tune of "All of Me," or Tom Stoppard's *Rosencrantz &*

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9 Beerbohm's parody of Henry James is a classic example. *See also, e.g.*, some of Peter Schickele's works, which mimic the style but not original content of works by Bach and others. *See generally* Addendum B *infra*, identifying many examples of parodies mentioned in the briefs of petitioners and their *amici* that do not appropriate copyrightable expression.

10 *See, e.g., Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980); *Fisher v. Dees*, 794 F.2d 432.

11 *See* David Broder, *What A New Justice Needs: Intellect Seasoned With Street Smarts*, Chi. Trib., April 1, 1993 at N 23.

Guildenstern Are Dead, and, on the other hand, "The Cunnilingus Champion of Company C,"[12] or a singing telegram franchiser's travesty of Superman and Wonder Woman featuring "Super Stud" and "Wonder Wench."[13]

- Who or what is the target? Some works aim at a particular work or author (*e.g.*, Beerbohm's famous parody of Henry James), others aim at genres (Mel Brooks' *Blazing Saddles*), while satire usually ridicules or lampoons exclusively, or largely, some third party or social institution. There is no reason to suspect broad "market failure" in licenses for satires.[14] *Amici* have licensed their songs for satires. *See*

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12 *MCA v. Wilson*, 677 F.2d 180.

13 *D.C. Comics, Inc. v. Unlimited Monkey Bus., Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984).

14 Summarizing the extensive case law distinguishing between parodies (works that purport to ridicule the works they mimic) and satires, Professor Goldstein notes that satires are entitled to little fair use consideration:

> One reason is that the copyright owner who is not willing to license a parody of his work may be more than willing, at a reasonable price, to license use of his work as a vehicle for social comment. Since negotiations will not inevitably be fruitless, the satirist should be required to go to the bargaining table with the copyright owner . . . even if the copyright owner refuses to license the proposed satirical use, no good reason exists for the satirist to get a free ride on the plaintiff's work. There will rarely be a shortage of other works . . . that, with some ingenuity, can be made to serve as equally effective vehicles for the intended satire. The importance of this last point is underscored by the rule, applied in fair use cases generally, that, for the fair use defense to apply, the defendant's work must by its nature require defendant to use plaintiff's work.

II Paul Goldstein, *Copyright* §10.2.1, pp. 211-12 (1989) (footnotes omitted).

Addendum A. The generalized assertion that licenses are not available for parodies is also incorrect. *Amici* have granted licenses for parodies (*see* Addendum A), and Weird Al Yankovic's parodies, which sell in the millions of copies, are licensed as well (*see* JA 325 and Brief of *Amici Curiae* Capitol Steps Production, Inc. *et al.*, at 16a).

Because the proper identification and weighing of all these factors on the facts of any case is plainly relevant to a fair use determination, identification of a work by its creator as a "parody," or even judicial characterization of a work as a genuine parody, cannot conceivably be dispositive or weigh presumptively in favor of fair use.

The suggestion that it is not for courts to assess these factors in the case of works claimed to be parody or satire is meritless. The putative infringer who defends by asserting fair use is necessarily asking the court to make that determination (to the extent that whether a work is a parody is relevant at all), just as those asserting fair use often require courts to determine whether a work is "criticism" or "comment" and to assess its "character." 17 U.S.C. § 107. Other provisions of the Copyright Act require courts to make comparably difficult judgments. *See, e.g.*, 17 U.S.C. § 106A (requiring courts to assess, *inter alia*, whether a defendant has or is about to make "any intentional distortion, mutilation, or other modification" of a work, and whether a work has "recognized stature"); 17 U.S.C. § 115 (requiring courts to assess whether a recording has changed the "fundamental character" of the recorded work).

It is unavoidable that in determining whether there is compelling equitable justification for the fair use exception in a particular case, the court must assess the nature of the use (including whether a particular work mocks or ridicules the work it copies) and its purpose (*e.g.*, to communicate political satire, or merely to use a familiar tune as the vehicle to attract attention with the familiar or for the coarse and vulgar, as in *MCA v. Wilson*). The putative infringer cannot, at the same time, ask a court for a ruling that the work is fair

use and then complain that the court may not make a determination of the purpose and character of the work.

B. Parodies Are Not Entitled to Generic Special Treatment Denied to Other Categories of Speech Eligible to be Fair Uses

There is no warrant for making parodies presumptively fair use.

Although § 107 designates a number of categories of purposes or uses as candidates for fair use, including "criticism, comment, news reporting, teaching . . . , scholarship, or research,"[15] those categories are only *eligible* for the fair use "defense," and are not presumptively entitled to it. Any judicial determination concerning the fair use issue requires the full analysis that § 107 commands. Congress insisted, as this Court held in *Harper & Row*, that the § 107 categories were

> not intended . . . to single out any particular use as presumptively a "fair" use. . . . [and] resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.

Harper & Row, 471 U.S. at 561.

The principal basis advanced by petitioners and their *amici* for holding parodies to be presumptively fair use — that parodies are "criticism" and "comment" specifically mentioned in § 107, categories of speech which are particularly valuable — cannot be squared with *Harper & Row* or with the text of § 107. There is no basis for concluding that parody is more important than, for example,

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[15] Those categories are not the only candidates for fair use; the list in the first sentence of § 107 is non-exclusive. *See Harper & Row*, 471 U.S. at 561 (citing S. Rep. No. 94-473 at 61).

the news reporting that this Court held in *Harper & Row* was not presumptively entitled (and, on the facts of that case, not entitled at all) to fair use.

Nor is their any basis for concluding that the broad range of works that could arguably be termed "parodies" are in fact comment or criticism. Some works meeting the dictionary definition of parody — that is, works that take aim at the work copied — may be. Some satires (using the melody of one work to poke fun of some unrelated person or institution) may use the work copied for comment or criticism. But many humorous settings of new words to old melodies are neither comment nor criticism — for example, the "Cunnilingus Champion of Company C" is not. As Professor Gordon observes at pp. 1601-02 of her recent article (*supra*, p. 11, n.8),

> when a comedian writes a ditty like "When Sonny Sniffs Glue" (parodying "When Sunny Gets Blue"), or Mad Magazine publishes a lyric entitled "Louella Schwartz Describes Her Malady" (parodying "A Pretty Girl is Like a Melody), it seems as if any song might do as a vehicle. The parodist's purpose is simply to take some familiar song, any song, and create humor by showing the unexpected changes that can be rung upon its meter and rhyme scheme. . . . Nor could the parodist easily make a claim based on equality with first creators.

Nor is there any need to copy a substantial amount of expression in order to create a parody. For example, the musical *Grease* parodies the genre of 1950's rock-and-roll without copying any particular work. The examples of parodies larded through the briefs of the *amici* supporting petitioners make clear that denying the opportunity to take substantial amounts of prior copyrighted material would not inhibit genuinely creative new work ridiculing prior creative work or noted persons or institutions. The creativity involved in most of the examples of parody used by petitioners' *amici* did not take any original expression at all, or did so years after any

copyright would have expired. (*See* Addendum B). The very premise of protecting works for "limited times" is that some uses, while worthwhile, can wait until copyright has expired.

The other basis advanced by petitioners and their *amici* for treating parodies as presumptively fair uses, equally without merit, is alleged market failure. This theory rests on the alleged "facts" (which are not of record and rest on nothing more than *ipse dixit*) that obtaining permission at market prices is impracticable or simply unavailable. But extensive licensing markets and organized systems for obtaining permission or authorization, in which *amici* and others actively participate, preclude any notion that obtaining licenses is generally impracticable. Seeking and obtaining permission (assuming it would be granted) is *always* practicable for mass-market recorded "parodies," given the lead time that goes into mass-marketed recordings. (By contrast, the need for spontaneity and speed in some cases, as with Mark Russell's evening performance of a song he wrote in the morning in response to late-breaking events, may well be a factor favoring fair use. *See, e.g.*, H.R. Rep. No. 94-1476 at 69, recognizing that spontaneity and the need for capturing a moment is a factor that may favor fair use). Furthermore, permission often *is* available. *Amici* themselves are frequently asked for and grant permission for parodies (when they themselves are the targets) and for satirical uses as well (targeting others). For example, *amici* (and other composers and songwriters as well), have licensed their works to be commercially parodied in the cabaret *Forbidden Broadway*, as shown in Addendum A below.

Here, as in *Harper & Row*, 471 U.S. at 557 n. 6, "it bears noting that Congress in the Copyright Act recognized a public interest warranting specific exemptions in a number of areas," but failed to craft any such exemption for commercial parodies, or for parodies generally.

III. STATUTORY FOUR FACTOR ANALYSIS AND RELEVANT EQUITABLE CONSIDERATIONS COMPEL REJECTION OF ANY PRESUMPTION FAVORING PARODIES OR SATIRES AS A FAIR USE

Because petitioners' fair use defense (and those of other parodists or takers for satirical or humorous uses) depends on the usual application of the four statutory factors and other equitable considerations, principles relating to those matters are worthy of further discussion.

A. First Factor — Purpose and Character of the Use

1. A Profit-Motivated Commercial Use For Entertainment Purposes Disfavors Fair Use. The authorities are unanimous that a commercial use for a profit-motivated purpose is presumptively unfair in first factor analysis (the "*Sony* presumption"). *Harper & Row*, 471 U.S. at 562; *Sony*, 464 U.S. at 451; *Stewart*, 495 U.S. at 237. This principle simply executes the first factor statutory command that in each case the court must consider the "purpose and character of the use, including whether such use is of a commercial character or is for non-profit educational purposes."[16]

Observing that many humorous uses in our society, and most that attempt to reach the mass markets, are commercial, petitioners and their *amici* attack the *Sony* presumption as overbroad and unfairly stacking the deck against parodies. But as *Harper & Row* teaches, the *Sony* presumption simply recognizes that it is presumptively reasonable and fair to expect commercial users, who set out to generate revenues and profits, to pay for their intellectual property

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[16] The ordinary meaning of the word "commercial" is an activity relating to commerce or trade, looking toward financial profit, or having profit as the primary aim. *Webster's Third New International Dictionary (1976)*; *Oxford English Dictionary*, Vol. II (1978); *The American Heritage Dictionary*, Second College Edition (1991).

inputs if the copyright owner authorizes the use, just as they pay for other inputs.

Lower courts have on occasion found the *Sony* presumption outweighed or rebutted where a very limited use was heavily transformative (so that defendants were profiting largely from their own creativity, rather than the borrowed work), and the character of the use, albeit commercial, was for "broader public purposes." *See Twin Peaks Productions, Inc. v. Publications Int'l, Ltd.*, No. 92-7933, 1993 U.S. App. LEXIS 13454 at *19 (2d Cir. June 7, 1993) (citing such cases involving scholarly biographies and works of non-fiction).

Whatever reasons there might be for finding the *Sony* presumption outweighed when the infringing work serves salutary public purposes (and even in *Harper & Row* the public importance of the news reporting use was not considered to be a factor heavily favoring fair use), certainly those reasons are inapplicable to profit-motivated works whose primary purpose is entertainment. If the *Sony* presumption disfavoring a commercial use as a fair use is not applicable to mass-marketed works of entertainment sold in the same record stores as the copyright owner's works, such as The 2 Live Crew's widely distributed *As Clean As They Wanna Be*, then that presumption, as petitioners and their *amici* wrongly urge, would be a dead letter.[17]

2. First Amendment Considerations Do Not Categorically Favor Fair Use for Parodies, Satires or Humorous Uses. Properly understood, copyright protection does not interfere with Free Speech interests in comment and criticism, but rather serves them, by

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[17] Notwithstanding petitioners' after-the-fact defense of parody, it should be decisive for first factor purposes disfavoring fair use that "Pretty Woman" was included on an album that was marketed as straight entertainment, that it was not marketed as a parodic, satiric or humorous work (such as licensed recordings by Mel Brooks or Weird Al Yankovic, for example), and that authorship was attributed to the writers of the original "Oh, Pretty Woman."

fostering the creation and wide dissemination of music and other works. *Feist Pub., Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991); *Harper & Row*, 471 U.S. at 557-58; *Schnapper v. Foley*, 667 F.2d at 114; *In re Capital Cities/ABC, Inc.*, 918 F.2d 140, 143-44 (11th Cir. 1990) ("the First Amendment is not a license to trammel on legally recognized rights in intellectual property") (citations omitted). *See also* II Goldstein, *Copyright*, § 10.3; 1 *Nimmer on Copyright* § 1.10.

The demand by petitioners and their *amici* that there must be a parody or satirical use exception to the *Sony* presumption is indistinguishable from a comparable request in *Harper & Row* that the Court firmly and wisely rejected, stating:

> In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright. Whether verbatim copying . . . in a given case is or is not [a] fair [use] must be judged according to the traditional equities of fair use.

471 U.S. at 560. That same reasoning and those same principles are entirely applicable here.

3. The Extent of Any Productive and Transformative Use is Part of First Factor Analysis. Whether the new work serves a transformative purpose, *i.e.*, uses and transforms a limited portion of a prior copyrighted work in the course of creating a new work for a socially desirable purpose, such as literary criticism, is part of first factor analysis. Thus, where the parody, satire or humorous use does make a meaningful comment or criticism of some person, institution, or prior work that would be understood as such by its audience, then that element (although not the entire first factor) would weigh in the

user's favor. By contrast, a parody or satirical use that, for example, lacks or is not distributed or performed as having political or meaningful social content is not entitled to any special first factor credit.

Where the purpose and character of the use is simply to exploit interest in the prior copyrighted work or to taint or tarnish it — not by criticizing or commenting, but merely as a vehicle for entertainment or to satisfy baser tastes for coarseness or vulgarity, or to substitute for the user's own lack of creativity — there is a lack of productive or transformative quality that courts need consider affirmatively for first factor purposes. *See MCA v. Wilson*, 677 F.2d 180; *D.C. Comics v. Unlimited Monkey Bus.*, 598 F. Supp. 110.

B. Second Factor — The Nature of the Copyrighted Work

The appropriation of any of respondent's or *amici's* music or lyrics, regardless of purpose, points against fair use. Music and lyrics are quintessentially creative and therefore deserving of strong copyright protection. *Stewart*, 495 U.S. at 237.

C. Third Factor — The Amount and Substantiality of the Portion Used

In *Harper & Row*, the Court held that the third factor favored the copyright holder even though only very little of the work was taken — 300 words from a book of hundreds of pages. The reasoning was that the work taken was qualitatively substantial, the "heart" of the copyrighted work. That same reasoning applies to the case at bar, and would apply whenever a comparably central portion of a song (or more) were taken by a commercial infringer for parody or humorous satirical use — unless there is something special about such works that would exempt them from the usual rule.

Although the course of the law's development on that question has not been smooth, one rule is settled, and correctly so: where extensive expression is copied the third factor points against fair use,

and indeed fair use almost always will be unavailable.[18] The number of persons and entities in this nation who would, if given a chance, use the famous and recognizable melodies from such past masters as Berlin, Bernstein, Gershwin, Kern, Rodgers, Loewe, and Porter, is legion; were entire albums created with new lyrics to their songs, millions of copies could well be sold. Similarly, the ability of advertising agencies to create unlicensed humorous commercial advertisements using *amici's* melodies, in ways that experts might be found to opine were satirical or made the originals ridiculous, can hardly be overestimated. Copyright preserves these economic and artistic values for the copyright owners. (*See* Addendum A for examples of advertisements and other derivative works licensed by *amici*.)

Whether there is occasion for any special third factor credit for cases of true parody — whether copyists are entitled to do more than "conjure up" the original works — is a much-debated question whose analysis, *amici* believe, has seemingly overlooked the extent to which parody is possible without any actionable taking whatsoever. *See* the parodies cited in Addendum B.

In any event, here, as elsewhere, fair use is a question of degree in concrete factual circumstances. Certainly, the more taken, the more fair use is disfavored in third factor analysis. Applying that simple equitable insight, it is notable that the cases in which song

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[18] *See Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Warner Bros. v. American Broadcasting Cos.*, 654 F.2d 204 (2d Cir. 1981); *MCA v. Wilson*, 677 F.2d at 185. 3 *Nimmer on Copyright* (§ 13.05 [C], at 13-102.28(16)) approves the Second Circuit's retreat in *MCA* from dicta previously indicating virtually no limits to the degree of copying by a parody, noting that that Circuit's previous view, in *Elsmere*,

> went too far, suggesting an open-ended standard whereby wholesale appropriation of another's work becomes possible under the banner of fair use provided only that elements of humor are added.

parodies or humorous uses have been found to be fair use have generally involved very little appropriation of the original.[19]

D. Fourth Factor — Harm to the Potential Market For or Value of the Work

1. Users Have the Burden of Showing that Widespread Uses Like Theirs Would Be Unlikely To Deprive Owners of Potential Licensing Revenues. The fourth factor requires an examination of the facts to determine "the effect of the use on the *potential market* for or value of the copyrighted work," an inquiry that depends on logic, common sense and assessment of likely economic effects. *See Stewart*, 495 U.S. at 238 ("The record supports the Court of Appeals' conclusion that re-release of the film impinged on the ability to market new versions of the story. Common sense would yield the same conclusion"). Contrary to the view of the dissent below, of the district court, and of petitioners and their *amici*, the inquiry is *not* limited to whether a use would "fulfill[] the demand for the original" in the form that that work was first distributed (here, not limited to lost record sales of Roy Orbison's single "Oh, Pretty Woman"). Economic harm to be considered under the fourth factor pertains to the effect on both the original and derivative works and includes lost licensing income. *Id.*; *Harper & Row*, 471 U.S. at 568; *New Era Pub. Int'l ApS v. Carol Pub. Group*, 904 F.2d 152, 159 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990). Moreover, relatively little need be shown by the copyright owner

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[19] *Compare, e.g., Fisher v. Dees*, 794 F.2d at 434 (song copied only six bars of music, and no lyrics); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (none of the music was copied, and any copying of lyrics, if it existed at all, was barely actionable); and *Elsmere*, 623 F.2d at 253 (copying of only four notes of music, and the words "I Love") *with MCA v. Wilson*, 677 F.2d at 185 ("We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire").

concerning harm; "[a]ctual present harm need not be shown" and it is not "necessary to show with certainty that harm will result" from the use. *Sony*, 464 U.S. at 451.

Sony formulated an additional important concept when it declared that although it is necessary in the case of non-commercial use to show "by a preponderance of the evidence that *some* meaningful likelihood of future harm exists," in the case of a commercial unauthorized use, the likelihood of meaningful future harm should be "presumed." *Sony*, 464 U.S. at 451. This presumption adverse to fair use in fourth factor analysis is interrelated with the "commercial" use presumption disfavoring a fair use under the first factor.[20] Both presumptions are based on the reasonable assumption that if the copier is making a commercial use of a copyrighted work, the copier would be willing to pay an economically reasonable amount for that use, and therefore that failure to do so would harm the copyright owner.

A related and critically important rule is that the relevant harm is not simply the harm caused by the specific unauthorized use at issue (here, The 2 Live Crew's song), but also the harm, often more important, that would flow from widespread conduct of that kind (here, the unauthorized commercial use for mass-market distribution of the melodies and basic lyrics of popular songs). *See Sony*, 464 U.S. at 451; *Harper & Row*, 471 U.S. at 568; H.R. Rep. No. 90-83, 90th Cong., 1st Sess. 35 (1967) ("Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented"); 3 *Nimmer on Copyright* § 13.05[A][4] at 13-102.26.

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[20] *Id.; Association of Am. Med. Coll. v. Cuomo*, 928 F.2d 519, 525 (2d Cir.), *cert. denied*, 112 S.Ct. 184 (1991); *Financial Info., Inc. v. Moody's Investors Serv., Inc.*, 751 F.2d 501, 510 (2d Cir. 1984), *cert. denied*, 484 U.S. 820 (1987); *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989).

As previously discussed, in view of the current widespread dissemination of electronic playback equipment and mass-marketed commercial musical recordings, sanctioning unauthorized copying to the extent undertaken by The 2 Live Crew would predictably increase — by sizeable, and likely huge amounts — the amount of unconsented, substantial, commercial use of works previously created by *amici* and other authors, and thereby deprive the copyright owners of licensing revenues to the extent they choose, as they frequently do, to authorize such uses. Indeed, such a decision would likely spawn a cottage industry in which writers would add new, parodic, satiric or "humorous" lyrics to copyrighted melodies of successful prior musical works, as happened to "Oh, Pretty Woman" after the district court's judgment. JA 326-27. The multiplication of persons copying *amici's* works, released from the restraints of copyright and actively profiting from the melodic and lyrical genius of those who labored long and hard for highly uncertain rewards, is antithetical to the constitutional and statutory scheme of copyright.

2. Tarnishment of the Work and Satiation of Its Potential Audience Can Have a Serious Adverse Effect on the Copyright Owner's Ability to License Future Uses. The record below (JA 325) reflects what *amici's* experience has shown, namely that demand for future copies or derivative uses of the original work may also be reduced in two further ways: first, by tarnishment through associating the work with new and unwanted meanings (harming not only economic values but also the creative control interest that copyright protects); and second, by over-exposing a melody or song, tiring the public's desire to hear the song again. Both of these effects are relevant fourth factor harms weighing against fair use.

a. Tarnishment. No one disputes that economic harm caused by a critically adverse review of a copyrighted work is not harm for fourth factor purposes, and on that principle the trial court refused to consider tarnishment, viewing it as indistinguishable from the effect of such a critical review. The court's refusal was basic error. Harm from criticism is different from harm flowing from a

commercially exploitative tarnishment of the original work that degrades, vulgarizes or otherwise demeans that original work, and thereby creates "a new meaning" for the song "in the minds of listeners." JA 325. *Cf. Young v. American Mini-Theatres, Inc*, 427 U.S. 50 (1976) (distinguishing harm to audience caused by content of films from reduced property values that result from nuisance in neighborhood); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 24.16, at 24.131-135 (3rd ed. 1992) (collecting cases where trademarks were held diluted by tarnishment through use in unwholesome, degrading or dissonant contexts). Harm from a free-riding use of a popular melody also differs from the harm caused by a critical review.

Any doubt that courts can meaningfully distinguish between harm from criticism and harm from tarnishment or free-riding exploitation should be dispelled by Congress's recognition, in enacting § 115, of the importance of empowering creators to avoid alteration of the "fundamental character" of a work, including by "distortion, travesty, and perversion." *See supra* at 6-10.

Critical articles (even those that reproduce parts of a song or other musical work) do not attempt to exploit or capitalize on the popularity of the works they criticize. By contrast, works like those at issue in *MCA v. Wilson* or in this case harm the value of the works from which they are copied not by an appeal to the critical judgment of listeners, but rather by creating such negative associations, through distortion, perversion or travesty, that others who might otherwise have enriched the creators — potential purchasers of the original works or of licenses for derivative uses including advertisers and film producers — are deterred from doing so. Had The 2 Live Crew created and popularized a comparable version of Carly Simon's "Anticipation," for example, who could imagine that H.J. Heinz would have proceeded to license that song as the centerpiece of its advertising campaign? Would Revlon have purchased rights to Rodgers and Hammerstein's song "Gonna Wash That Man," if that song had become associated in the public mind with head lice?

Would Irving Berlin have had to stand by if "White Christmas" was recorded and widely sold with lyrics referring to cocaine?

It is illogical and unreasonable to grant creators such as *amici* the right, on the one hand, to carefully choose which theaters in which to present their works and which artists shall perform them, all from the artistic-economic judgment that only certain conditions will maximize the value of the work, while at the same time prevent them from stopping others from reshaping their works for commercial distribution with coarseness, vulgarity, or other distortion. Nearly every court to have squarely addressed this point has agreed.[21]

b. Satiation. Satiation of the potential market by over-exposure is another means by which parodies or other satirical or humorous uses harm potential markets for copyrighted works. The judgment of *amici* and many others is that the value of their copyrights is maximized by carefully limited distribution. Such musicals as *West Side Story* and *My Fair Lady* are licensed for first class revivals only infrequently, and The Walt Disney Company has achieved great success by maximizing demand through limiting release of its classic cartoons to short periods every few years. Were *amici's* songs subject under the fair use doctrine to unlimited parody, satire and humorous use in the mass markets of radio, television, film, videos and sound recordings, two forms of economic harm would quickly follow: extensive use without compensation to the copyright owner, and exhaustion of the public interest and consequent reduction of demand. JA 325. Because the statutory license substantially impairs *amici's* control over the dissemination of their highly successful works in original form, preserving the residual control over alteration of those works that Congress did provide for in §§ 106 and 115 is all the more important in order to protect the value of the works and their potential markets.

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[21] *See, e.g., MCA v. Wilson*, 677 F.2d at 185; *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1529 (S.D.N.Y. 1988) (citing additional cases).

E. Summing Up the Factors And Deciding the Case

Based on the principles that we have discussed, the case should be decided based on traditional fair use analysis, and under all the relevant facts and circumstances, petitioners should not be accorded the shelter of fair use. *Amici* place particular weight on petitioners' commercially exploitative use of a creative work for a profitable entertainment purpose, and the minimal nature (if any) of comment or criticism in the venture. This is reflected in the song's inclusion on an album marketed as straight entertainment; the taking of the central musical elements of "Oh, Pretty Woman," and the repetition of its first verse so as to trade on its popularity and familiarity; the attribution of authorship of the altered version to the writers of the original song, to trade on their fame; the harm to the value of and markets for the song caused by the sale of over 248,000 copies of the derivative use of their song; the potential harm to the original from tarnishment and over-exposure; the record evidence showing the likely increase in unlicensed uses if petitioners' fair use claim were upheld; the existence of active licensing of "Oh, Pretty Woman"; the absence of any political speech or criticism in petitioners' use; and the availability of other means for petitioners to criticize those aspects of culture and society they allegedly targeted. The judgment below should therefore be affirmed.

A use such as The 2 Live Crew's in this case, which used a substantial portion of a copyrighted song for commercial purposes through exploitation of the mass market, differs substantially from some of the uses engaged in by petitioners' *amici*, such as The Capitol Steps and Mark Russell. A satirical re-write of a tune by Bernstein or Berlin performed at the Gridiron Dinner, or at the Shoreham Hotel in Washington, D.C., will not satiate public demand as might use on The Tonight Show with Jay Leno. Courts may and should take account of such relevant differences, just as *amici* do.

CONCLUSION

The art of parody or satire is not in jeopardy if the judgment below is affirmed, as it should be based on the facts of this case applying traditional fair use principles expressed in the statute and in prior decisions of this Court. At most, if that judgment is not affirmed, there is no basis for determining as a matter of law that petitioners' use is a fair use, and in the procedural posture of this case (where only the defendants moved for summary judgment), the case should be remanded to the trial court for plenary development and adjudication of all of the pertinent facts and relevant fair use considerations in accordance with the principles applicable to parody laid down by this Court in this case.

Respectfully submitted,

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ADDENDUM A

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EXAMPLES OF LICENSING BY *AMICI CURIAE*

A. Parodies and Satires Performed in Cabarets

- Alan Jay Lerner and Frederick Loewe's song "I Remember It Well" was licensed for use with altered lyrics by "The News In Review," a group which performs musical political satires.
- Two Cole Porter songs were licensed for use with altered lyrics by "The News In Review."
- The producers of Forbidden Broadway, a long-running, frequently updated musical spoof on Broadway productions, have purchased licenses to use numerous songs composed by Richard Rodgers and Oscar Hammerstein, Irving Berlin, Leonard Bernstein, Alan Jay Lerner and Frederick Loewe, and numerous others, and to create and perform derivative works with new humorous lyrics, including, for example:
  - "Madonna's Brain," sung to the tune of Lerner and Loewe's "The Rain in Spain."
  - "I've Grown Accustomed to This Show," sung to the tune of Lerner and Loewe's "I've Grown Accustomed to Her Face."
  - "Just You Wait, Julie Andrews," sung to the tune of Lerner and Loewe's "Just You Wait, Henry Higgins."
  - "Chita/Rita," sung to the tune of Bernstein's "America."
  - "A Few of My Souvenir Things," sung to the tune of Rodgers and Hammerstein's "My Favorite Things."

- "Climb Every Rainbow," sung to the tune of Rodgers and Hammerstein's "Climb Every Mountain."
- "The Farmer and the Cowman," sung to the tune of Rodgers and Hammerstein's "Farmer and the Cowman."
- "I'm an Asian, Too," sung to the tune of Irving Berlin's "I'm an Indian, Too."
- Irving Berlin's song "Anything You Can Do," sung by the helicopter from the musical "Miss Saigon" and the chandelier from the musical "Phantom of the Opera." The lyrics were changed from "Anything you can do, I can do better" to "Anywhere you can fly, I can fly higher."
- John Kander and Fred Ebb's song "New York, New York" was licensed to be performed with altered lyrics.

B. Derivative Works Distributed as Rock, Rap and Jazz Recordings

- Various Cole Porter songs, many of them with altered arrangements and some with altered lyrics, were licensed to be performed by rock and rap singers on an album and videotape entitled "Red, Hot + Blue."
- Rodgers and Hammerstein's "My Favorite Things" was licensed for use by John Coltrane for his jazz version.

C. Derivative Works for Television

- Children's Television Workshop purchased a license to record Cole Porter's songs "I Get A Kick Out of You" and "Let's Do It" with substituted lyrics for "Sesame Street."

- Children's Television Workshop purchased a license to record the songs "I Remember It Well" and "Wouldn't It Be Loverly", by Alan Jay Lerner and Frederick Loewe, with substituted lyrics for "Sesame Street."
- "Soliloquy" by Rodgers and Hammerstein is licensed, without cost, to be performed annually with special lyrics in the Jerry Lewis Telethon for the Muscular Dystrophy Association.
- Cole Porter's "You Do Something for Me" was licensed for use with substituted lyrics in the British television series "Jeeves and Wooster."

D. Advertising

- Bristol-Myers Company purchased a license to use the song "I'm Gonna Wash That Man Right Outta My Hair" by Rodgers and Hammerstein in a television advertisement, with the word "man" replaced by the word "gray." The licensing fee was $72,500 for the first year, and $80,000 per year for the next two years, with additional sums required for use of the song in any radio advertising.
- General Electric company purchased a license to use Alan Menken's song "Git It (Feed Me)" from the show "Little Shop of Horrors" in a battery advertisement. The same song has also been licensed for use in an advertisement for Pizza Hut.
- United Airlines purchased a license to use George Gershwin's "Rhapsody in Blue" in a television advertisement.
- Dove Chocolate purchased a license to use George Gershwin's "Concerto in F" in its advertisements.
- George Gershwin's song "Somebody Loves Me" was licensed for use in an advertisement for Post Raisin Bran.

- George Gershwin's "An American in Paris" was licensed for use in an ice cream advertisement in Italy.
- The songs "But Not for Me" and "Embraceable You" by George and Ira Gershwin were licensed for use in a Peugot Car advertisement in France.
- Ira and George Gershwin's song "'Swonderful" was licensed for use in a Crest toothpaste advertisement.
- "Summertime" by DuBose Heyward and George and Ira Gershwin was licensed for use in a Dannon yogurt television advertisement in France.
- Cole Porter's "I've Got You Under My Skin" was licensed for use in a Vanish toilet bowl cleaner commercial, with the lyrics "I've got you under my rim". The song was also licensed for use in advertisements for Aramis Men Fragrances and Cheer laundry detergent (with no lyric changes permitted).
- Cole Porter's "You'd be So Nice to Come Home to" was licensed for use in an advertisement for Hilton Hotels.
- Cole Porter's song "Night and Day" was licensed for use in advertisements for Audi and for Air France.

E. Derivative Works for Film

- Leonard Bernstein's "Big Stuff" was licensed for use in the recent film "Malcom X."
- Woody Allen licensed and used numerous Gershwin tunes, including "Our Love is Here To Stay" and "Rhapsody in Blue," in his film "Manhattan."
- George and Ira Gershwin's songs "But Not for Me" and "Let's Call the Whole Thing Off" were licensed for use in the film "When Harry Met Sally"

F. Performances

- Songs and other musical works of *amici* have been licensed for performance world-wide through ASCAP or BMI.

G. Other

- The state of Oklahoma is licensed, without cost, to use Rodgers and Hammerstein's "Oklahoma" as its state song and to use it in advertisements promoting tourism.
- The United States Postal Service is licensed, without cost, to print stamps celebrating the musical "Oklahoma."

ADDENDUM B

ADDENDUM B

PARODIES IDENTIFIED BY PETITIONERS AND THEIR *AMICI* THAT WOULD NOT HAVE NEEDED TO RELY ON A FAIR USE DEFENSE

A. Works That Did Not Appropriate Copyrightable Expression

- Henry James' style parodied by Beerbohm, A Mote in the Distance (1926)
- Style of Playboy Magazine parodied by Ramos
- 18th Century Opera styles parodied by Mozart, A Musical Joke (1787)
- Shostakovich, Symphony No. 7 (1941) parodied by Bartok, Concerto for Orchestra (Intermezzo) (1943)
- Wagner, Tristan and Isolde (1856) parodied by Debussy, The Golliwog's Cakewalk (1908)
- McLaughlin Group (TV show) parodied by Saturday Night Live skit
- Soap Operas parodied by Tootsie (1982 film) and Soap (TV series)
- Plays of Aeschylus and Euripides (5th c. B.C.) parodied by The Frogs and The Birds (Aristophanes - 405 and 414 B.C.)
- Canon Camera TV ad parodied by Saturday Night Live TV ad
- MTV Channel parodied by MTV: Give Me Back My Life (Comedy Central feature)
- Sports Illustrated (swimsuit issue) parodied by Sports Titillated (MAD Magazine)

- State Dept. Newsletter parodied by Anonymous, State Dept. Employees

B. Works Whose Copyright Protection (Assuming the Application of Protection Afforded by the Copyright Act of 1976) Would Have Expired

- The Lord's Prayer parodied by Anonymous, Concerning Pay for the Army (1780)
- Carroll, Alice in Wonderland (1838) parodied by Stackpole, Rosie in Squanderland (1936)
- Titian, Venus (1538) parodied by Manet, Olympia (1863)
- Manet, Olympia (1863) parodied by Rivers, I Like Olympia in Blackface (1970)
- Manet, Olympia (1863) parodied by Ramos, Manet's Olympia (1974)
- DaVinci, Mona Lisa (1506) parodied by DuChamp, (1915)
- DaVinci, Mona Lisa (1506) parodied by Warhol, Thirty Are Better Than One (1963)
- Tchaikovsky, 1812 Overture (1880) parodied by P.D.Q. Bach (Schickele), 1712 Overture
- The Odyssey (Homer - ca. 700 B.C.) Ulysses (Joyce - 1922)
- Don Quixote (Cervantes - ca. 1610) parodied by Guernica (Picasso - 1937)
- The Iliad (Homer - ca. 700 B.C.) parodied by Troilus and Cressida (Shakespeare - ca. 1609)
- Hamlet (Shakespeare - ca. 1600) parodied by Rosencrantz and Guildenstern Are Dead (Stoppard - 1967)

- The Importance of Being Earnest (Wilde - 1899) parodied by Travesties (Stoppard - 1975)
- The Last Supper (DaVinci painting - ca. 1497) parodied by M*A*S*H (1970 film)

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OCTOBER TERM, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICI CURIAE HOME BOX OFFICE, COMEDY CENTRAL, FOX INC., MAD MAGAZINE, and NATIONAL BROADCASTING COMPANY, INC., IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE NATURE OF PARODY OFTEN REQUIRES USE OF MATERIAL FROM AN EXISTING COPYRIGHTED WORK	5
II. PARODY IS A FORM OF EXPRESSION THAT IS ENTITLED TO FIRST AMENDMENT PROTECTION	10
III. THE FAIR USE DOCTRINE AS CURRENTLY INTERPRETED PROVIDES UNCERTAIN PROTECTION FOR PARODY	13
A. Limiting Fair Use to Noncommercial Uses Precludes Protection for Much Legitimate Parody	14
B. The Fictional or Factual Nature of the Copyrighted Work Should Not Affect Fair Use Protection for Parody	16
C. A Parodist Should Not Be Limited to Copying Only the Essential Minimum Necessary to "Conjure Up" the Existing Work	17
D. A Parody's Adverse Effect on the Value of a Copyrighted Work Is the Natural Product of Comedy and Criticism	19
IV. FAIR USE PROTECTION FOR PARODY REQUIRES CONSIDERATION OF FIRST AMENDMENT CONCERNS	21
A. Protection for Parody Must Ensure the Preservation of First Amendment Values Without Infringing the Interests of Copyright Owners	22

TABLE OF CONTENTS—Continued

	Page
B. The Statutory Fair Use Factors Are Not Exclusive But Should Assist in Measuring the Legitimacy of a Claimed Parody	25
1. Purpose and Character of the Use	26
2. Nature of the Copyrighted Work	26
3. Amount and Substantiality of the Portion Used	27
4. Effect on the Market	29
CONCLUSION	30

TABLE OF AUTHORITIES

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	Page
Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964)	7, 9, 12, 15, 21, 22
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TABLE OF AUTHORITIES—Continued

	Page
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STATUTES

17 U.S.C. § 101 (1988)	10
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	Page
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STATEMENT OF INTEREST

This brief is submitted on behalf of *amici curiae* Home Box Office ("HBO"), Comedy Partners, doing business as Comedy Central ("Comedy Central"), Fox Inc. ("Fox"), *Mad Magazine* ("*Mad*"), National Broadcast-

ing Company, Inc. ("NBC") (collectively *Amici*).[1] *Amici* individually own and license a vast and diverse array of copyrighted works. They also create and distribute works in which satire and parody of current events, culture, and copyrighted materials of others (including the others' works) plays a significant part.[2]

HBO provides premium television programming to over 23 million subscribing viewers throughout the United States. HBO telecasts feature length motion pictures licensed to HBO, as well as other television programs that are produced by or for HBO. Among the parodies telecast by HBO are a comic movie trailer for the fictitious film, "Raging Bullwinkle," which parodies the film "Raging Bull," and a parody of the "Crazy Eddie" television commercials entitled "Crazy Ollie" in which an actor portraying Oliver North uses flamboyant and outrageous tactics to sell weapons to a television audience.

Comedy Central is a basic cable television service that reaches approximately 28 million homes throughout the United States and offers comedy programming in various genres. Comedy Central received widespread acclaim for its comedic coverage of the 1992 presidential campaign that included parodies of candidates' public appearances and the presidential debates. Other examples of its parodies include "MTV: Give Me Back My Life," a parody of the music video channel and music videos in general, and sketches from NBC's "Saturday Night Live" parodying the McLaughlin Group and a Canon camera advertisement.

Fox, through its subsidiary Twentieth Century Fox Film Corporation produces and distributes feature length

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[1] Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.

[2] *Amici* have lodged a videotape with the Court that contains selected examples of parody they have produced, distributed, and/or telecast.

motion pictures, including "Hot Shots! Part Deux," which mocks war movies and Hollywood's penchant for attempting to creatively name sequels to hit movies. Fox Broadcasting Company, another subsidiary of Fox, broadcasts television programming via its 140 network affiliates throughout the United States. One of those television programs, "Comic Strip Live," is a weekly standup comedy series that includes many parodies. Another Fox subsidiary, Twentieth Television, produces and distributes television programming, including "In Living Color," which frequently spoofs current events and popular culture, and "The Simpsons," which often includes satirical references to cultural icons.

Mad is a humor magazine published eight times a year by E.C. Publications, Inc. *Mad* regularly publishes parodies of popular movies and television programs, such as "A-lad-Dim" (parodying the Walt Disney movie "Aladdin") and "I Love Luny" (satirizing the "I Love Lucy" television series). In recent issues, *Mad* also has parodied the "Superman" comic book series, as well as the cover of *Sports Illustrated* magazine's celebrated annual swimsuit issue, entitled "Sports Titillated."

NBC, through its owned stations and more than two hundred affiliates, broadcasts television programming throughout the United States. NBC's independent production company, NBC Productions, produces original television programming and feature films, including "Saturday Night Live," "Late Night," and "The Tonight Show With Jay Leno." NBC also broadcasts programs created by outside producers, including series such as "Laugh-In" and "SCTV Network." These series routinely parody films, news and entertainment television programs, songs, and current events, such as political debates.

SUMMARY OF ARGUMENT

Parody is a unique art form that imitates and distorts existing creative works "to entertain, inform, or stir public consciousness." *Warner Bros. v. American Broadcasting Cos.*, 720 F.2d 231, 243 (2d Cir. 1983). Courts routinely recognize that parody is a form of expression that is protected by the First Amendment. When faced with copyright infringement claims against parodists, however, courts have slighted the First Amendment and thus have applied to parody a truncated version of the doctrine of fair use.

Application of the fair use doctrine to parody has often been erratic and confusing. The Sixth Circuit denied copyright protection for "Pretty Woman" because 2 Live Crew created it for a commercial purpose, but few parodies are *not* created for a commercial purpose. Other courts have restricted the amount of copyrighted material a parodist may safely use to the minimal amount necessary to "conjure up" the existing work, but such a standard allows courts to make subjective judgments based on their distaste for the perceived quality of the parody. As a result, protection for parody has been inconsistent, is unpredictable, and at times—as illustrated by this case—has improperly been denied altogether.

Amici urge the Court to recognize that legitimate parody is entitled to First Amendment protection and that the statutory fair use factors cannot be mechanically applied in the context of parody. The Court should articulate an objective standard that provides consistent protection for legitimate parody and tailors the fair use factors to serve the First Amendment and to assist in determining the legitimacy of a claimed parody.

ARGUMENT

I. THE NATURE OF PARODY OFTEN REQUIRES USE OF MATERIAL FROM AN EXISTING COPYRIGHTED WORK.

When addressing parody in the context of copyright infringement claims, some courts, including the court below, demonstrate a fundamental misunderstanding of the nature and purpose of this unique art form. Parody is commentary cloaked in humor that serves "a dual purpose: casting a critical eye on society's creators while at the same time contributing to that very pool of genius." Albin, *Beyond Fair Use: Putting Satire in Its Proper Place*, 33 UCLA L. Rev. 518 (1985). Parody entertains and represents an important—and constitutionally protected—means of communicating ideas.

"Parody, in its purest form, is the art of creating a new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of an original." Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395 (1984).[3] "Many of the finest political and religious satires are . . . parodies. They preserve the form of the original almost inviolate, and merely distort the content a little—usually making it franker and more realistic." G. Highet, *The Anatomy of Satire* 76 (1962). A parody may ridicule the existing work itself or it may use that work as a vehicle for lampooning the flaws of

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[3] Differing definitions of "parody" abound. *See, e.g., Rogers v. Koons*, 960 F.2d 301, 309-10 (2d Cir.) (defining parody as "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original"), *cert. denied*, 113 S. Ct. 365 (1992); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir.) ("The Oxford English Dictionary defines parody as '[a] composition in which the characteristic turns of thought and phrase of an author are mimicked to appear ridiculous, especially by applying them to ludicrously inappropriate subjects.' "), *cert. denied*, 483 U.S. 1013 (1987).

society at large. For example, the British radical Henry Labouchere distorted his country's national anthem, not to critique the song but to criticize the prolific and profligate family of Queen Victoria:

> "Grandchildren not a few,
> With great-grandchildren too,
> She blest has been.
>
> We've been their sureties,
> Paid them gratuities,
> Pensions, annuities.
> God Save the Queen."

Id. at 77 (quoting H. Pearson, *Labby* (1936)).[4]

Labouchere's version of "God Save the Queen" illustrates how an artist creates a new work using portions of an existing work as a uniquely effective means of communicating ideas. Labouchere used a substantial amount of the British national anthem—including the music, the meter, the rhyme scheme, and the final line of verse—and created his own lyrics. The resulting original work expresses his critical message with special meaning and power through the humorous alteration of a familiar song that lauds the virtues of the British monarch and her subjects. Incorporating portions of the underlying work gave the parody more impact and made Labouchere's message more accessible than if he had merely expressed the same ideas directly.

In a similar vein, the Fox program "In Living Color" framed Bill Clinton's arrival in the White House in the context of the theme song and characters from the television series, "The Beverly Hillbillies":

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[4] "God Save the Queen" also was altered in this country into the song, "My Country 'Tis of Thee." While the American revision may not have been originally intended as "humorous," it became a parody of the British national anthem by heralding liberty, the antithesis of monarchy.

> Come and listen to a story 'bout a man named Bill,
> Hick razorback with a destiny to fill;
> But 20 years before he would take the oath and creed,
> He dodged Vietnam, and he toked a little weed.
> Reefer, that is. Mary Jane. Didn't inhale.
>
> Well, the next thing you know Bill's the head of Arkansas,
> Fiddling with the budget and a honey from Hee Haw;
> We said, "Hey, Bill you should be the chief exec!"
> So we balanced off the ticket with another redneck.
> Gore, that is. Senator, Tennessee.
>
> The Capitol Hillbillies!

Again, the parody did not target the song itself, but used the theme represented by this song—a poor, uneducated man becomes wealthy and important overnight—to satirize Clinton's rise to national prominence despite problems in his past.

Parodies, of course, are not limited to music[5] but can be created from any form of expression, including works of literature,[6] drama,[7] opera,[8] motion pictures,[9] televi-

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[5] For other examples of music parody in addition to the case before this Court, see, *e.g.*, *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (discussing parody of Johnny Mathis song, "When Sunny Gets Blue" created by altering lyrics to "When Sonny Sniffs Glue"); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.) (evaluating *Mad*'s "parody lyrics to 57 old standards," including transforming "A Pretty Girl is Like a Melody" into "Louella Schwartz Describes Her Malady"), *cert. denied*, 379 U.S. 822 (1964). Contemporary music parodists also include Peter Schickele (better known as P.D.Q. Bach) and Tom Lehrer.

[6] *See, e.g.*, G. Highet, *The Anatomy of Satire* at 67-147 (discussing numerous examples of literary parody, including James Joyce's "Ulysses," as a parody of Homer's "Odyssey").

[7] *See, e.g., id.* at 120-24 (discussing parodies of drama, including Shakespeare's "Troilus and Cressida" as a parody of episodes of the "Iliad").

[8] *See, e.g., id.* at 124-28 (discussing satire and parody in the works of Jaques Offenbach and Gilbert and Sullivan, whose work also has been parodied).

[9] *See, e.g., Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955) (Sid Caesar parody of film,

sion,[10] periodicals,[11] advertisements,[12] and fine art.[13] Acclaimed playwright Tom Stoppard often uses parody in his works, including "Travesties" (parodying Oscar Wilde's "The Importance of Being Ernest") and "Rosencrantz and Guildenstern Are Dead" (parodying "Hamlet"). Television and film, as virtually universal forms of communication, are particularly fertile areas for parodists, providing both creative works to parody and a medium for creation of parody. Parody of such works has played—and continues to play— a pivotal role in television series from "Laugh-In" and "Monty Python's Flying Circus" to "Saturday Night Live" and "In Living Color."

"From Here to Eternity" entitled "From Here to Obscurity"). *Mad* regularly parodies current films. Motion picture parodies of other films include "Airplane!," which parodied the "Airport" films, and the recent "Loaded Weapon," parodying the "Lethal Weapon" movies.

[10] *See, e.g., Warner Bros. Inc. v. American Broadcasting Cos.*, 720 F.2d 231 (2d Cir. 1983) (parody of "Superman" character and television series by television show "The Greatest American Hero"). The television series "Soap," was a parody of daytime television dramas, as was the motion picture "Tootsie."

[11] *National Lampoon* magazine uses parodies extensively and has devoted entire issues to parodying another magazine. One example was a parody version of *Sports Illustrated* (which *Mad* has also parodied) with articles such as "Dog Fishing in America."

[12] *See, e.g., Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991) (parody of Eveready battery commercials featuring the "Energizer bunny"). The Fox film "Hot Shots! Part Deux" also parodies the "Energizer bunny." The "Saturday Night Live" episodes telecast by Comedy Central often parody television commercials, including a sales pitch for "Bass-O-Matic" as a take-off on "Veg-O-Matic."

[13] For example, Leonardo Da Vinci's masterpiece, "The Last Supper" has often been parodied, including a scene in the film, "M*A*S*H," in which a suicidal army dentist's comrades have a "last supper" for him and the characters assume the positions in the famous painting.

HBO is currently telecasting a program entitled "Hearts of Hot Shots! Part Deux—A Filmmaker's Apology," about the making of the new Fox film, "Hot Shots! Part Deux." The HBO program previews the film but also parodies "Hearts of Darkness: A Filmmaker's Apocalypse," a feature about the making of Francis Ford Coppola's "Apocalypse Now." "Hearts of Hot Shots!" tracks the form and content of "Hearts of Darkness," using and altering many scenes to poke fun at its more somber precursor. The program uses humor not only to describe the film but also as a uniquely powerful way of commenting on what the program perceives as the overblown self-importance of "Hearts of Darkness."

The Fox television series "Comic Strip Live" telecast a parody of the Fox movie "Home Alone" entitled "Nursing Home Alone," which replaced the movie's overlooked yet resourceful child hero with a feisty nursing home resident. The parody not only lampooned the film, but was a criticism of society's treatment of the elderly. Comedy Central telecast an advertising parody originally produced and aired by NBC on "Saturday Night Live" targeting the commercial for the Canon AE-1 camera and its slogan, "So advanced, it's simple." The parody had the same "look" as the commercial, but used comedian Eddie Murphy playing the blind Stevie Wonder as the photographer to demonstrate that the camera was not that simple—and that we can laugh *with* the handicapped without laughing *at* them.

As these examples illustrate, parodies express a variety of ideas. Parody can have as grand an object as exposing the foibles of humanity,[14] or as narrow a vision as

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[14] *See, e.g., Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.) (finding no infringement in *Mad*'s publication of "a collection of parody lyrics to 57 old standards *which reflect the idiotic world we live in today*") (emphasis added), *cert. denied*, 379 U.S. 822 (1964).

simply rendering an original work ridiculous.[15] The nature of parody, however, is to comment or criticize through the humorous use and alteration of material taken from an existing work. A parodist thus exercises First Amendment rights through the productive use of material—often copyrighted material—created by another artist. *Cf. Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985) (finding reproductive, as opposed to productive, use was not fair use or protected by First Amendment).

II. PARODY IS A FORM OF EXPRESSION ENTITLED TO FIRST AMENDMENT PROTECTION.

Protection of parody, like no other issue of copyright law, illustrates that "views of copyright and the First Amendment, held 'side by side,' may, in fact, be contradictory." 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 1.10[A], at 1-62 (1992). Parody by its nature frequently requires the use of copyrighted material. By incorporating material from a copyrighted work, parodies arguably fall within the statutory definition of a "derivative work," which the holder of a valid copyright generally has the exclusive right to create.[16] At least as applied to parody, however, monopoly rights in expression are at odds with the freedom of expression guaranteed by the First Amendment.[17]

To date, copyright claims against parodists have largely escaped First Amendment scrutiny. Courts have recognized in other contexts, however, that satire and

[15] *See, e.g., Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (altering lyrics of song, "When Sunny Gets Blue" to "When Sonny Sniffs Glue").

[16] *See* 17 U.S.C. §§ 101 & 106 (1988) (defining "derivative work" and granting copyright holders exclusive rights to create or authorize creation of such works).

[17] "The language of the First Amendment does not limit its protection to speech which is original with the speaker but rather states that Congress shall make 'no law' abridging freedom of speech." 1 M. Nimmer & D. Nimmer, *supra*, at 1-63.

parody are forms of expression protected by the First Amendment. In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), this Court held that the First Amendment precluded the Reverend Jerry Falwell from recovering damages for emotional distress arising out of *Hustler's* offensive parody of him (which in turn was contained within a parody of an advertising campaign). The Court observed that "[d]espite their sometimes caustic nature, . . . graphic depictions and satirical cartoons have played a prominent role in public and political debate." *Id.* at 54.[18] While acknowledging that the parody of Falwell was "at best a distant cousin of the political cartoons described above," the Court found no "principled standard to separate the one from the other" under the First Amendment. *Id.* at 55.[19]

In a related context, the First Circuit employed the First Amendment to insulate trademark parodists from liability under state anti-dilution statutes in *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir.), *cert. denied*, 483 U.S. 1013 (1987). The court expressly recognized that "[d]enying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute

[18] The Court also found that distinctive presidential features "have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them." *Id.* at 55.

[19] *See also White v. Samsung Electronics America*, 989 F.2d 1512, —— (9th Cir. 1993) (1993 WL 73915) (Kozinski, J., dissenting from order rejecting suggestion for rehearing en banc) ("Parody, humor, irreverence are all vital components of the marketplace of ideas. The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them . . . ."); *Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438 (10th Cir. 1982) (First Amendment protected sexually explicit parody of Miss America beauty contest in defamation action), *cert. denied*, 462 U.S. 1132 (1983).

a serious curtailment of a protected form of expression." *Id.* at 34.[20]

Well-known copyrighted works are just as "woven into the fabric of our daily lives" as famous trademarks, and parodies of such works can play as "prominent a role in public and political debate" as a personal lampoon; yet no court has expressly applied the First Amendment to parodies of copyrighted works.[21] Most courts evaluating

[20] The court also observed,

> The central role which trademarks occupy in public discourse (a role eagerly encouraged by trademark owners), makes them a natural target of parodists. Trademark parodies, even when offensive, do convey a message. The message may be simply that business and product images need not always be taken too seriously; a trademark parody reminds us that we are free to laugh at the images and associations linked with the mark. The message also may be a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark's owner. While such a message lacks explicit political content, that is no reason to afford it less protection under the first amendment.

Id. (citations omitted); *see Cliffs Notes v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 493 (2d Cir. 1989) (protecting parody from liability for trademark infringement after observing that "parody is a form of artistic expression, protected by the First Amendment"); *see generally*, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 U. Va. L. Rev. 1079 (1986).

[21] *But see Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875 (S.D. Fla. 1978) (finding no fair use of copyrighted *TV Guide* magazine cover but use was protected by First Amendment), *aff'd on other grounds*, 626 F.2d 1171 (5th Cir. 1980) (finding fair use and not reaching First Amendment issue). Some courts also have noted in copyright cases "the broad scope permitted parody in First Amendment law," *Groucho Marx Prods. v. Day and Night Co.*, 689 F.2d 317, 319 n.2 (2d Cir. 1982), and have stressed without reference to the First Amendment that "satire and parody are deserving of substantial freedom— both as entertainment and as a form of social and literary criticism." *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545

claims of copyright infringement never mention the First Amendment, or simply reject out of hand any constitutional arguments proffered by the parodist.[22] Current doctrine, therefore, recognizes an artist's First Amendment right to parody public individuals or prominent symbols and names, but does not address whether that artist can parody an individual's or business' copyrighted works. No reasoned basis exists for such an anomaly in the protection of parody.

III. THE FAIR USE DOCTRINE AS CURRENTLY INTERPRETED PROVIDES UNCERTAIN PROTECTION FOR PARODY.

Without attention to the First Amendment, courts have sought to employ the doctrine of "fair use," codified at 17 U.S.C. § 107, to determine the extent to which parodies should be protected from claims of copyright infringement—often with inconsistent and unpredictable results.[23] Indeed, some courts have stated that "the fair

(2d Cir.), *cert. denied*, 379 U.S. 822 (1964); *see Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986) ("parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author").

[22] *See, e.g., Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758-59 (9th Cir. 1978) (summarily rejecting First Amendment defense because free speech rights exist only in uncopyrightable ideas as opposed to the copyrighted expression of those ideas), *cert. denied*, 439 U.S. 1132 (1979). In this case, the courts below simply ignored the First Amendment. This Court has addressed the First Amendment's impact on copyrights only in the context of a claimed right to disseminate newsworthy information *earlier* than the copyright holder could publish it. *Harper & Row*, 471 U.S. at 555-60. Parody, by contrast, would not exist *at all* but for its ability to use copyrighted material.

[23] The statutory fair use factors as currently applied to parody may not be equipped to deal with First Amendment concerns. As one commentator observed,

> By engendering an inappropriate substantiality test, by unduly emphasizing commercial motivations, and by disregarding

use doctrine encompasses all claims of first amendment in the copyright field." *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). Such a belief is particularly troubling because many courts—including the Sixth Circuit in this case—appear to view the statutory fair use factors as the exclusive method of parody analysis. If not informed by the unique nature of parody and its value under the First Amendment, however, the four fair use factors enumerated in the Copyright Act can be misconstrued to deny the proper level of protection.[24]

A. Limiting Fair Use to Noncommercial Uses Precludes Protection for Much Legitimate Parody.

The first statutory fair use factor variously construed in parody cases is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). The difficulties with application of this factor may arise from this Court's statement in a non-parody context that commercial use creates a presumption of harm to the copyright holder. *Sony Corp. v. Universal*

> the historic role of parody as entertainment and criticism, the fair use test has placed the parodist in doubt as to the extent of his right to publish his works and has thus inhibited the free exercise of an ancient and valuable art.

Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. New Eng. L. Rev. 39, 57 (1980).

[24] Courts, in the name of applying fair use factors, can limit protection according to their assessment of a particular parody's content. Some courts have taken advantage of this flexibility to reject a fair use defense for parodies they find in questionable taste. *See, e.g., MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) (disallowing parody defense to alleged infringement of song "Boogie Woogie Bugle Boy of Company B" by song "Cunnilingus Champion of Company C"); *Air Pirates*, 581 F.2d 751 (disallowing parody defense to comic book using Disney characters engaging in drug use and sexual activity).

City Studios, Inc., 464 U.S. 417, 451 (1984). But the Court has further explained that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562.[25]

In any event, this factor should not be mechanically applied to distinguish fair from unfair use in parody. Indeed, most—if not all—of the reported parody cases accepting the fair use defense involved commercially produced parodies.[26] Those courts recognized "that many parodies distributed commercially may be 'more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the [copyrighted] work.'" *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (quoting *Pillsbury Co. v. Milky Way Prods.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981)).

"Exploitation of the copyrighted material without paying the customary price" also has little meaning in the context of parody. No "customary price" exists for the right to parody a copyrighted work,[27] nor should such a price be imposed.[28] More fundamentally, *amici* share

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[25] Even as so formulated, this standard would provide more protection for commercially produced parody than that accorded by the Sixth Circuit's single-minded focus on the "commerciality" of 2 Live Crew's parody. As applied to parody, the inquiry would center on whether the use improperly "exploited" the copyrighted material, regardless of whether the parodist had a profit motive.

[26] *See, e.g., Fisher*, 794 F.2d 432 (parody contained in commercial comedy album); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (per curiam) (television parody of "I Love New York" promotional campaign); *Berlin*, 329 F.2d 541 (*Mad* parodies of popular songs).

[27] "The parody defense to copyright exists precisely to make possible a use that generally cannot be bought." *Fisher*, 794 F.2d at 437.

[28] If a popular work is the subject of a parody, the parody also may be popular. Such popularity—and its attendant financial suc-

the uneasiness of Judge Nelson in his dissent below "about the prospect of the courts turning copyright holders into censors of parody." Petition for Certiorari, Appendix ("App.") A at 33a. A license requirement for parody would enable copyright holders to stifle criticism of, or comment on, their work and the societal themes of which it is a part, thus severely limiting discussion in the marketplace of ideas protected by the First Amendment.

The Sixth Circuit's decision below is the most glaring example of misapplication of the "commerciality" factor to parody. Taking the language of *Sony*, the Sixth Circuit began its fair use inquiry "from the position that the use is unfair." *Id.* at 13a. Although it ostensibly examined the remaining statutory fair use factors, in its final analysis the court relied entirely on this single factor:

> In dealing with uses popularly termed parodies, the factors involving the commercial nature of the use and the damage to the defendant are of particular significance. It is likely, for example, that an identical use of the copyrighted work in this case at a private gathering on a not-for-profit basis would be a fair use. *It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use.*

Id. at 17a-18a (emphasis added). Because, like most creative works in our society, virtually all parodies are created for a "commercial" purpose, the Sixth Circuit's approach to this factor would effectively eviscerate fair use protection for parodies.

B. The Fictional or Factual Nature of the Copyrighted Work Should Not Affect Fair Use Protection for Parody.

The statutory fair use factor assessing "the nature of the copyrighted work," 17 U.S.C. § 107(2), has not

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cess—should not be considered an "exploitation" of material from the copyrighted work as long as the parody is a creative criticism or comment. *See* discussion *infra* at 24-25.

been the focus of any court's decision concerning whether a parodist's use of material from a copyrighted work was fair use. When mentioned, however, this factor nevertheless has been found to militate against a finding of fair use for parody. In other contexts, the nature of the copyrighted work affects whether a use is fair because "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row*, 471 U.S. at 563. Fact and fiction, however, are equally susceptible to parody, and neither should receive an exemption. As Judge Nelson pointed out below in his dissent, "parody routinely sets its sights on the fictive as opposed to the factual," and it makes "no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for the parodists' mill for the last two and a half millennia." App. A at 28a.[29]

C. A Parodist Should Not Be Limited to Copying Only the Essential Minimum Necessary to "Conjure Up" the Existing Work.

The most widely used statutory fair use factor is "the amount and substantiality of the portion [of the copyrighted work] used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). Parodies of motion pictures illustrate courts' difficulties in applying this factor. In an early and celebrated copyright infringement case, Comedian Jack Benny created a television parody of the motion picture "Gaslight," and the copyright holder of the film sued for infringement. Mechanically reciting the intended similarity of locale, plot developments, characters, and dialog between the two works, both the district

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[29] *See* Albin, *Beyond Fair Use: Putting Satire in Its Proper Place*, 33 UCLA L. Rev. 518, 545 (1985) ("there is no reason to protect any work from parody"); *see generally* G. Highet, *The Anatomy of Satire* 67-147 (1962) (analyzing parodies over the centuries, all of which were parodies of literature, drama, music, and poetry, rather than of factual material).

court and the Ninth Circuit Court of Appeals concluded that Benny's use of material was an infringement: "[P]arodized or burlesque taking is to be treated no differently from any other appropriation; . . . if it is determined that there was a substantial taking, infringement exists." *Loew's Inc. v. Columbia Broadcasting Sys.*, 131 F. Supp. 165, 182 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by equally divided Court*, 356 U.S. 43 (1958).

Several months later, the same district court was presented with a virtually identical case in which comedian Sid Caesar parodied the film "From Here to Eternity" on his television program "Your Show of Shows," but in this case the court found no infringement:

> Since a burlesquer must make a sufficient use of the original to *recall or conjure up* the subject matter being burlesqued, the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work in the creation of other fictional or dramatic works not intended as a burlesque of the original.

Columbia Pictures Corp. v. National Broadcasting Co., 137 F. Supp. 348, 354 (S.D. Cal. 1955) (emphasis added). Caesar's use of material from "From Here to Eternity" was almost the same as Benny's use of "Gaslight," yet the court justified its disparate decisions with the generalized determination that Benny's use was "substantial," while Caesar's was not.

These cases continue to raise doubts about the extent to which a parodist may use material from a copyrighted work. The district court's "recall or conjure up" standard, moreover, has been used by the Ninth Circuit to set a ceiling on the amount of material a parodist may use from a copyrighted work:

> when persons are parodying a copyrighted work, the constraints of the existing precedents do not permit them to take as much of a component part as they need to make the "best parody." Instead, their desire to make the "best parody" is balanced against the rights of the copyright owner in his original expression. That balance has been struck at giving the parodist what is necessary to conjure up the original. . . .

Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).[30]

The Second Circuit, on the other hand, has interpreted "recall or conjure up" as it was originally used by the California district court—"not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point." *Elsmere Music, Inc. v. National Boradcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam). In light of the conflict on this issue, a parodist may feel obliged to avoid creating the "best parody" and may attempt to use no more of the copyrighted work than is necessary to "conjure up" or "place firmly in the reader's mind the parodied work and those specific attributes that are to be satirized." *Air Pirates*, 581 F.2d at 758.

D. A Parody's Adverse Effect on the Value of a Copyrighted Work Is the Natural Product of Comedy and Criticism.

The final fair use factor misconstrued by some courts in the context of parody is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). In a non-parody context, this Court has identified the effect on the market for the original as the most important factor in fair use analysis.

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[30] *But see Fisher*, 794 F.2d at 439 (arguably softening the decision in *Air Pirates* by stating that "[w]e did not set a fixed limit on copying, but merely expressed our judgment that that particular parody could easily have been accomplished through more restricted means").

Harper & Row, 471 U.S. at 566. Coupled with the presumption of harm from commercial uses announced in *Sony*, this factor can become a potent weapon against parody, particularly when misapplied to works of implied or direct criticism.

The Sixth Circuit's decision below again provides a clear example of abuse of this factor. In evaluating the effect on the potential market, the court held, "[t]he focus is on *potential* harm, and the 'inquiry must take account not only of harm to the original but also of harm to the market for derivative works.'" App. A at 16a (quoting *Harper & Row*, 471 U.S. at 568) (emphasis in original). The court presumed harm because of the commercial purpose of the parody, despite the district court's finding that the parody would not adversely affect the market for the original work. The court then concluded that this factor did not support a finding of fair use. *Id.* at 17a.

Such a virtually irrebuttable presumption of harm precludes fair use protection of parody. By its nature true parody often *intends* to "wound[] the original (however slightly), pointing out faults, revealing hidden affections, emphasizing weaknesses and diminishing strengths." G. Highet, *The Anatomy of Satire* 68 (1962). Any resulting harm to the original is likely to be the result of this ridicule, not an unfair use of copyrighted material. Compensation for losses attributable to criticism has never been—and should not be—a legitimate concern of copyright law.[31] As one commentator succinctly observed, moreover,

> If the satire is essentially a humorous criticism of another work, it seems quite unlikely that anyone would decide *not* to buy the original and instead buy the satire. Without the original, the satire is not funny! In fact, if the parody is quite popular, it may spur many people to buy the original, thereby *increasing* the demand for it.

Albin, *Beyond Fair Use: Putting Satire in Its Proper Place*, 33 UCLA L. Rev. 518, 545 (1985) (emphasis in original).

Courts more sensitive to the nature and purpose of parody accordingly have focused their inquiry on whether the parody "fulfills the demand for the original." *Fisher*, 794 F.2d at 438.[32] According to these courts, a finding that the parody at issue would not fulfill demand for the original—as should be true of all legitimate parodies—supports a finding that the parody's use of the copyrighted material was fair. The presumption of harm imposed by the Sixth Circuit thus substantially conflicts with much prior case law and would prevent a finding of fair use of copyrighted material in the vast majority of parodies.

IV. FAIR USE PROTECTION FOR PARODY REQUIRES CONSIDERATION OF FIRST AMENDMENT CONCERNS.

As copyright owners themselves, *amici* are keenly aware of the importance of copyright protection. In order to protect the First Amendment rights of parodists, however, copyright law should be tailored to accomplish its intended purpose, *i.e.*, promoting creative achievement—a purpose that is also served by fostering original and creative parodies. The focus of the fair use test when applied to parody thus should be to assess the legitimacy of a claimed parody, not merely to recite the statutory factors.

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[31] Such "injuries," moreover, have always been the price paid for exercise of First Amendment freedom. *E.g.*, *Falwell*, 485 U.S. at 50-56.

[32] *Accord, e.g.*, *Berlin*, 329 F.2d at 545; *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 747 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (per curiam).

A. Protection for Parody Must Ensure the Preservation of First Amendment Values Without Infringing the Interests of Copyright Owners.

Without this Court's guidance on the meaning and purpose of parody, the lower courts will continue to apply the fair use factors in an erratic and unpredictable manner. A parody may criticize the work from which it uses material, or it may use that material to comment on societal themes of which the existing work is a part.[33] A parody may focus on part of a particular work, or it may target the work as a whole; it may directly criticize the copyrighted work by making it laughable, or it may build more subtly on the work to convey indirectly a comment that could not be expressed head on. As the Second Circuit and others have emphasized, however, a parody must add some original element of comment or criticism to be worthy of protection, not simply reproduce an existing work.[34] The originality of the parody comes from "using the [existing work] as a known element of modern culture and contributing something new for humorous effect or commentary." *Elsmere Music*, 623 F.2d at 253 n.1.

This Court should find, therefore, that a protected parody is an original artistic work that incorporates portions of the ideas and expressions of a recognizable, previously published work, altering or building on that previous work as a means of expressing criticism or comment on that work or on societal themes of which that work is a part. Such protection for parody minimizes the impact on the rights of copyright owners while extending to parodists their expressive rights under the First Amendment.

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[33] *See Berlin*, 329 F.2d 541 (protecting *Mad* parodies to be sung to the tune of popular songs, not all of which were direct targets of the parodies).

[34] *See, e.g., Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975) (use of entire copyrighted song as background music to an orgy "did not parody the Mickey Mouse March but sought only to improperly use the copyrighted material").

Copyrights, of course, also have their source in the Constitution, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings." U.S. Const. art. I, § 8, cl. 8. Economic incentives are granted to authors, however, "to promote the progress of science and useful arts":

> "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."

Sony, 464 U.S. at 431-32 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).[35]

Protection for parody might, in theory, deny creators a full economic benefit of their works because they would not be able to exact a fee for parody licenses, but in reality, no such market is workable:

> Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom

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[35] As the Second Circuit has also observed,

> It is a fundamental objective of the copyright law to foster creativity. However, that law has the capacity both to augment and diminish the prospects for creativity. By assuring the author of an original work the exclusive benefits of whatever commercial success his or her work enjoys, the law obviously promotes creativity. At the same time, it can deter the creation of new works if authors are fearful that their creations will too readily be found to be substantially similar to preexisting works.

Warner Bros. v. American Broadcasting Cos., 720 F.2d 231, 240 (2d Cir. 1983).

> strong enough to permit granting of permission even in exchange for a reasonable fee. The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought.

Fisher, 794 F.2d at 437 (citation omitted); *accord* Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. Colo. L. Rev. 79, 90 (1991) ("As an initial matter, parodists who inquire about the availability of parody rights generally meet the reply that the rights are simply not for sale. Furthermore, authors who sue parodists often seem as concerned with stopping unflattering references to their work as they are with any financial loss.") (footnote omitted).[36]

In any event, the absence of a market for parody licensing should not deter artists from future creation.

> After all, any work of sufficient notoriety to be the object of parody has already secured for its proprietor considerable financial benefit. According that proprietor further protection against parody does little to promote creativity, but it places a substantial inhibition upon the creativity of authors adept at using parody to entertain, inform, or stir public consciousness.

Warner Bros. v. American Broadcasting Cos., 720 F.2d 231, 242-43 (2d Cir. 1983). Creators can reasonably anticipate revenues from licensing a film adaptation of their novel, for example, or from granting permission for use of their song in a movie soundtrack. But they should have no reasonable anticipation of licensing their works to critics—be they reviewers or parodists—and thus will not be discouraged from creating works by the absence of a market for parody rights. Establishing such a market also would raise serious First Amendment concerns, and would be tantamount to requiring a speaker to obtain permission to criticize a public individual or institution.

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[36] The defendant in *Fisher* sought and was denied permission to use the copyrighted song for his parody. 794 F.2d at 437. 2 Live Crew also sought, and not surprisingly was refused, permission to parody "Oh Pretty Woman."

"Parody that qualifies as an original work represents an expansion of artistic creation, which is exactly what copyright[] law seeks to protect." Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 Temple L. Rev. 133, 170 n.307 (1988); *see Warner Bros.*, 720 F.2d at 242 ("It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor."). Protecting parody as *amici* respectfully propose would further the goals of both copyright and free expression.

B. The Statutory Fair Use Factors Are Not Exclusive But Should Assist in Measuring the Legitimacy of a Claimed Parody.

The fair use doctrine can accommodate First Amendment and other interests in parody. Indeed, Congress expressly identified parody as a fair use in the 1976 amendment codifying the doctrine, and Congress never intended that the four statutory factors be the exclusive means of assessing fair use in all circumstances: "Beyond a very broad statutory explanation of what fair use is and *some* of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5680 (emphasis added).[37] When used to assess the legitimacy of a claimed parody, the statutory factors can become an important means of assuring protection for both parodists and copyright owners.

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[37] *See id.* at 5678 (listing "use in a parody of some of the content of the work parodied" as a fair use).

1. *Purpose and Character of the Use.*

Analysis under the first statutory fair use factor, "the purpose and character of the use," should focus on whether the claimed parody has altered or built on material incorporated from an underlying copyrighted work as a vehicle for criticism or comment. The "commercial" or "noncommercial" purpose of the parodist in creating the parody should not determine whether a particular work is a parody subject to fair use protection.

In the case before the Court, 2 Live Crew's "Pretty Woman" is an original work that incorporates portions of Acuff-Rose's "Oh Pretty Woman," humorously altering the music, lyrics, and style of that work as a means of criticism or comment. As the district court concluded, "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nevertheless the facts convincingly demonstrate that it is a parody." App. B at 42a. The Sixth Circuit accepted this conclusion.[38] App. A at 10a. That is all that should be required under this factor.

2. *Nature of the Copyrighted Work.*

The "nature of the copyrighted work" generally should not affect the analysis except to require that only material from a recognizable, previously published work may be used in a parody. The nature of parody is to criticize or comment using material from a *familiar* work,

[38] The Sixth Circuit's reluctance in accepting the district court's conclusion stemmed from the circuit court's overly restrictive view that it is "direct comment, comment which is expressly and unambiguously directed at the message of the original work, which constitutes parody," and "even accepting that 'Pretty Woman' is a comment on the banality of white-centered popular music, we cannot discern any parody of the original song." App. A at 11a n.8. The Sixth Circuit nevertheless found that this factor weighed against a finding of fair use because of 2 Live Crew's commercial purpose in creating the parody.

not a work that has yet to be published or widely distributed. *Cf. Harper & Row*, 471 U.S. 539 (analyzing fair use of unpublished material in non-parody context). "Oh Pretty Woman" has been published and is among the most recognizable songs in its genre. That should satisfy this factor. That "Oh Pretty Woman" is a "creative work" as opposed to a work of fact has no impact on whether "Pretty Woman" is a legitimate parody.[39]

3. *Amount and Substantiality of the Portion Used.*

The "amount and substantiality" factor has greater relevance to the legitimacy of a parody, but the inquiry should be limited to whether the challenged work is "original," *i.e.*, has made a productive use of the copyrighted material, as opposed to simply reproducing that material with little or no attempt to alter or build on it. As interpreted by the Ninth Circuit, the "recall or conjure up" test is too restrictive. Parodists should be permitted to create the "best parody," even if they use more material than is sufficient only to "recall or conjure up" the existing work.

The inquiry under this factor accordingly should focus on *how* the copyrighted material is used in the parody. To be eligible for fair use protection, all copyrighted material taken from an existing work and used in a parody of that work must be the object or part of the object of the parody's comment or criticism. On the other hand, if the existing work is not parodied directly but is utilized as a vehicle for satirizing broader societal themes, the copyrighted material taken from it must be used as an effective part of the parody, *i.e.*, it must contribute in a meaningful way to the comment or criticism intended

[39] *See* Albin, *Beyond Fair Use: Putting Satire in Its Proper Place*, 33 UCLA L. Rev. 518, 545 (1985) ("The 'nature of the copyrighted work' is ignored, as it should be, since there is no reason to protect any work from parody.").

by the parody.[40] This will ensure that copyrighted material is not gratuitously included in the parody simply to capitalize on the success of the existing work. *See Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir.) (finding that copyrighted material "was copied nearly *in toto*, much more than would have been necessary even if the sculpture had been a parody of plaintiff's work"), *cert. denied*, 113 S. Ct. 365 (1992).[41]

Here, the district court found that 2 Live Crew's work "appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose." App. B at 47a. "Pretty Woman" thus made a creative, as opposed to simply a reproductive, use of "Oh Pretty Woman." The Sixth Circuit incorrectly found that this factor did not support a finding of fair use because the court "conclude[d] that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original." App. A at 16a. 2 Live Crew produced a work in which copyrighted material was used only to comment on the existing work and the type of music it represents—a use that should satisfy this factor.

[40] This standard is a more detailed articulation of the Second Circuit's recognition that extensive use of copyrighted material is a fair use "provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." *Elsmere Music*, 623 F.2d at 253 n.1.

[41] Such a standard also would eliminate some courts' curious notion that music parodies are somehow entitled to use more of the copyrighted work to "conjure up" the existing work than are other types of parodies. *See, e.g., Fisher*, 794 F.2d at 439 (song parody has a " 'special need for accuracy,' providing some license for 'closer' parody") (quoting *Air Pirates*, 581 F.2d at 758). As 2 Live Crew's parody illustrates, however, some song parodies may use less of the original work than others. Regardless of the art form parodied, "short of . . . near-verbatim identity of content, the disparity of function between a serious work, and a satire based on it, will sometimes justify the defense of fair use even where substantial similarity exists." 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[C], at 13-102.28(18)-(19) (1992) (footnote omitted).

4. *Effect on the Market.*

When properly interpreted, the "effect of the use upon the potential market for or value of the copyrighted work" remains a vital factor in assessing the legitimacy of a parody. The inquiry under this factor is whether the claimed parody "fulfills the demand" for the existing work. "A court should thus require the plaintiff to demonstrate potential or actual commercial substitution of the parody for the original." Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395, 1409-10 (1984).

Acuff-Rose has not demonstrated that "Pretty Woman" fulfills the demand for "Oh Pretty Woman." The district court found that "it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different." App. B at 49a. The Sixth Circuit did not disagree but relied on a presumption of harm resulting from a commercial use. *Id.* at 16a-17a. No such presumption is appropriate for parody. The district court's inquiry was the proper one, and its conclusion paralleled the Ninth Circuit's decision in similar circumstances: "We do not believe that consumers desirous of hearing a romantic and nostalgic ballad such as the composer's song would be satisfied to purchase the parody instead." *Fisher*, 794 F.2d at 438.

2 Live Crew's work is a true parody. It is an original musical work that incorporates portions of the ideas and expression of an identifiable, previously published work, altering or building on that previous work as a means of expressing criticism or comment. "Pretty Woman" thus is entitled to First Amendment protection under the fair use doctrine.

CONCLUSION

Adequate protection for parody must be premised on proper application of the fair use doctrine in light of the First Amendment. 2 Live Crew used copyrighted material to create a legitimate parody. Such a work is entitled to full First Amendment and fair use protection.

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